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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 50

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS,
PLAINTIFF IN ERROR,

vs.

CLARENCE B[redacted]

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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FILED AUGUST 26, 1912.

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SUPREME COURT OF THE UNITED STATES.

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No. 333.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS, PLAINTIFF IN ERROR,

vs.

CLARENCE RUPP.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the Jefferson circuit court	1	1
Caption and parties	1	1
Petition	1	1
Summons and return on same	6	4
Summons to Franklin county and sheriff's return on same	7	4
Order set at rules	8	5
Order filing three exhibits	8	5
Order remand to rules	8	5
Exhibit Moulton—Letter, December 12, 1907, to Rupp	8	5
Order set at rules	9	6
Motion for judgment	9	6
Order to assign	9	6
Motion to remand	9	6
Order overruling motion	9	6
Order entering special appearance	9	6
Order time to file affidavits	10	6
Motion to quash	10	6

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1914.

	Original.	Print
Order filing affidavit of Pendleton Beckley	11	7
Affidavit of Pendleton Beckley	11	7
Order filing affidavit of Pendleton Beckley	13	8
Order time for additional affidavits	14	8
Affidavit of Pendleton Beckley	14	8
Order filing affidavit of George M. Moulton	15	9
Affidavit of George M. Moulton	16	9
Order overruling motion to quash return on summons	18	10
Order set at rules	18	10
Order remand to the rules	18	11
Order set at rules	19	11
Order filing answer	19	11
Order remand to rules	19	11
Answer	19	11
Order set at rules	28	16
Order filing written motion to strike from fourth paragraph of answer	28	16
Motion to require defendant to further paragraph second, fourth, and fifth paragraphs of answer	28	16
Order filing motion to require defendant to elect	28	16
Order filing demurrer to first, third, fourth, and fifth paragraphs of answer	29	17
Order to submit	29	17
Motion to further paragraph	29	17
Motion to elect	29	17
Motion to strike	30	17
Demurrer to answer	32	18
Order filing written opinion	32	18
Order sustaining demurrer to answer	32	18
Opinion	33	19
Order set at rules	39	22
Order declining to plead further and order dismissing plaintiff's petition ffor judgment for costs	39	22
Order for appeal	39	23
Schedule	39	23
Clerk's certificate	41	23
Statement on first appeall	42	23
Order submitting in courtt of appeals	43	24
Judgment court of appeals	43	24
Opinion of court of appeals on first appeal	44	25
Record on second appeal	53	28
Caption and pleas	54	29
Petition	55	29
Summons and return	60	32
Order entering special appearance	62	33
Motion to quash return on summons	62	33
Affidavit of Pendleton Beckley	62	33
Affidavit of Geo. M. Moulton	64	34
Order overruling motion to quash return on summons	66	36
Second amended answer	67	36
Demurrer	74	40

	Original.	Print
Judgment	75	40
Schedule	75	40
Certificate of clerk of circuit court	77	41
Statement second appeal	78	41
Order filing agreement	79	42
Agreement to add to record	79	42
Exhibits—Policy No. 23870	80	43
Policy No. 23892	89	48
Application	93	51
Order of submission	97	53
Judgment	97	53
Opinion on second appeal	98	54
Assignment of errors	101	56
Petition for writ of error and allowance of writ	103	57
Writ of error	107	59
Writ of error bond	109	60
Certificate of clerk of court of appeals	115	63
Citation	116	63

a COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set.:

Pleas Before the Honorable The Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, Kentucky, on the 12th Day of March, 1912.

WESTERN LIFE INDEMNITY COMPANY, Appellant,
vs.
CLARENCE RUPP, Appellee.

Appeal from the Jefferson Circuit Court, Common Pleas Branch, Second Division.

Be it remembered, that heretofore, to-wit, on the 21st day of March, 1910, the appellant, Western Life Indemnity Company, by its counsel filed in the office of the Clerk of the Court of Appeals a transcript of record in words and figures following, to-wit:—

1 #48871.

STATE OF KENTUCKY,
County of Jefferson:

Pleas Before the Honorable Thomas R. Gordon, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, at the Court-house, in the City of Louisville, County and State Aforesaid, and on the Dates Hereinafter Mentioned.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Transcript of Record.

Be it remembered that, heretofore, to-wit, on the 31st day of January, 1908 came plaintiff, by counsel, and filed his petition herein.

Said petition is in words and figures as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, — Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Petition Ordinary.

The plaintiff, Clarence Rupp, states that the defendant, Western Life Indemnity Company, is a corporation created by law
2 with power to sue and be sued, contract and be contracted with, and to do general life insurance business under and by its corporate name aforesaid.

The plaintiff states that on the — day of September, 1907, George McCormick applied to the defendant, Western Life Indemnity Company, for a policy of insurance on his life in the sum of One Thousand ($1,000) Dollars, and afterwards, to-wit: on the 20th day of September, 1907, the defendant accepted said application, and in consideration of $54.76 then paid to it by said George McCormick, which it then accepted, issued and delivered to said George McCormick an insurance policy numbered 23892 on the life of said George McCormick for One Thousand ($1,000) Dollars, by reason of which it undertook to and did insure the life of said George McCormick for the sum of One Thousand ($1,000) Dollars for a period of twelve months from said date, or until the 20th day of September, 1908, and by the terms of said contract or policy the same was to be continued upon an annual payment to it on the 20th day of September of each year during the continuance of said contract the said sum of $54.76; that by the direction and under the instruction of said George McCormick, the defendant issued said policy payable to this plaintiff, and this without this plaintiff's instance request or knowledge, should this plaintiff be living at the time of the death of said McCormick, otherwise to be paid to the insured's executor, administrator or assigns; said payment to be made upon satisfactory proof of death of the insured.

He states that afterwards, to-wit: on the 18th day of October, 1907, said McCormick departed this life, and afterwards due notice and proof of his death was furnished the defendant; that it then denied all liability under said policy and refused payment thereof; that said liability was denied through and by a letter written to this plaintiff and signed by the President of the defendant on December 12, 1907, which is as follows:

3 CHICAGO, ILL., *Dec.* 12, 1907.

Mr. Clarence Rupp, 1468 High Street, Louisville, Ky.

DEAR SIR: Receipt is acknowledged of your favor of December 11, 1907. As Mr. L. H. Spence, Superintendent of our claim department, has already advised you, and for reasons already known to you, this company denies any and all liability under the policies to which you refer in your letter.

Faithfully yours,

GEO. M. MOULTON, *President.*

that said policies referred to in said letter are the two policies issued and filed herewith. Plaintiff here files said letter as part of said petition marked "Moulton."

The defendant has broken and violated the terms of its contract as herein set out, and refused payment under said policy by reason of which it is indebted to this plaintiff in the sum of One Thousand ($1,000) Dollars.

He says that George McCormick, the insured, was an uncle of this plaintiff, and he had no wife or children and was largely dependent upon this plaintiff; that he lived in a house of this plaintiff, and at

times did work for this plaintiff. He files herewith as part hereof said policy marked Exhibit "A."

Paragraph #2.

He states that on the 7th day of September, 1907, George McCormick applied to the defendant, Western Life Indemnity Company, for a policy of insurance on his life in the sum of One Thousand ($1,000) Dollars, and afterwards to-wit: on the — day of September, 1907, the defendant accepted said application, and in consideration of $54.76 then paid to it by said George McCormick, which it then accepted, issued and delivered to said George McCormick an insurance policy numbered — on the life of said George McCormick for One Thousand ($1,000) Dollars by reason of which it undertook to and did insure the life of said George McCormick for the sum of One Thousand Dollars ($1,000) for a period of twelve months from said date or until the — day of September, 1908, and by the terms of said contract or policy the same was to be continued upon an annual payment to it on the — day of September of each year during the continuance of said contract of said sum of $54.76; that by the direction and under the instruction of said George McCormick, the defendant issued said policy payable to this plaintiff, and this without this plaintiff's instance, request or knowledge, should this plaintiff be living at the time of the death of said George McCormick, otherwise to be paid to the insured's executor, administrator, or assigns; said payment to be made upon satisfactory proof of death of the insured. He states that afterwards, to-wit: on the 18th day of October, 1907, said McCormick departed this life, and afterwards due notice and proof of his death was furnished the defendant; that it then denied all liability under said policy and refused payment thereof; that said liability was denied through and by a letter written to this plaintiff and signed by the president of the defendant on December 12, 1907, which is as follows:—

4

CHICAGO, ILL., *Dec.* 12, 1907.

Mr. Clarence Rupp, 1468 High Street, Louisville, Ky.

DEAR SIR: Receipt is acknowledged of your favor of December 11, 1907. As Mr. L. H. Spence, Superintendent of our claim department, has already advised you, and for reasons already known to you, this company denies any and all liability under the policies to which you refer in your letter.

5

Faithfully yours,

GEO. S. MOULTON, *President.*

that said policies referred to in said letter are the two policies issued and filed herewith. Plaintiff files said letter as part of said petition marked "Moulton."

The defendant has broken and violated the terms of its contract as herein set out, and refused payment under said policy by reason of which it is indebted to this plaintiff in the sum of One Thousand ($1,000) Dollars.

He says that George McCormick, the insured, was an uncle of this plaintiff, and he had no wife or children and was largely dependent upon this plaintiff; that he lived in a house of this plaintiff, and at times did work for this plaintiff. He files herewith as part hereof said policy marked Exhibit "B."

Wherefore, he prays judgment against the defendant in the sum of $2,000.00 for his cost herein and all general and proper relief.

EDWARDS, OGDEN & PEAK,
Attorneys for Plaintiff.

Clarence Rupp, on oath, says that the foregoing statements are true.

CLARENCE RUPP.

6 Subscribed and sworn to before me this 27 day of January, 1908. My commission expires Jan. 11, 1910.

JAS. P. EDWARDS,
N. P., Jeff. Co., Ky.

Thereupon the Clerk issued Summons and copy which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the Sheriff of Jefferson County, Greeting:

We command you to summon Western Life Indemnity Company #8871 to answer a petition filed against it in our Jefferson Circuit Court, by Clarence Rupp and warn it that upon failure to answer within twenty days after service hereof, if in Jefferson County, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option; and make due return of this summons within sixty days from the date hereof.

Witness, W. L. Weller, Jr., Clerk of said Court, this 31 day of January 1908.

W. L. WELLER, JR., *Clerk.*
P. KALTENBACKER, *D. C.*

The Sheriff's return on the foregoing is as follows:
Came to hand Jan. 31, 1908 at 3.25 P. M.
The within named not found.

CHAS. L. SCHOOL, *S. J. C.*
By JNO. MELLRECH, *D. C.*

7 Thereupon on the 19th day of February, 1908 the Clerk issued summons and copy to Franklin County, which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the Sheriff of Franklin County, Greeting:

We command you to summon Western Life Indemnity Company, #48871 to answer a petition filed against it in our Jefferson Circuit Court, by Clarence Rupp and warn it that upon failure to answer within twenty days after service hereof if in Jefferson County, or within thirty days if elsewhere in the State, Judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option; and make due return of this summons within sixty days from the date hereof.

Witness W. L. Weller Jr., Clerk of said Court, this 19th day of Feb. 1908.

W. L. WELLER, Jr.,
By P. KALTENBACKER, *D. C.*

The Sheriff return on the foregoing is as follows:

Executed the within Summons on the Western Life Indemnity Co. by delivering a true copy thereof to C. W. Bell Insurance Commissioner for the State of Ky.

This Feb. 21, 1908.

R. C. HIEATT. *S. F. C.*

8 At a Court Held on the 21st Day of March, 1908.

This action was set at rules by the plaintiff on the 16th inst.

Came the plaintiff, by counsel and filed herein three exhibits marked Exhibit "A," Exhibit "B" and Exhibit "Moulton."

On motion of the plaintiff, by counsel ordered that this action be and is remanded to the rules.

Said exhibits filed on the 21st day of March, 1908 *is* as follows:

"EXHIBIT MOULTON."

DECEMBER 12, 1907.

Mr. Clarence Rupp, 1462 High St., Louisville, Ky.

DEAR SIR: Receipt is acknowledged of your favor of December 11th. As Mr. L. H. Spence, Superintendent of our Claim Department, has already advised you and for reasons already known to you this Company denies any and all liability under the policies to which you refer in your letter.

Faithfully yours,

GEO. M. MOULTON, *President.*

G. M. M.
G. O. S.

9 At a Court Held on the 28th Day of March, 1908.

This action was set at rules by the plaintiff on the 23rd inst.

Came the plaintiff, by counsel, and moves the Court for a judgment herein; To which the defendant objects.

On motion of the defendant, by counsel, ordered that this action be and is assigned to *the* April 1st, 1908 at 9 o'clock A. M. for hearing on said motion.

At a Court Held on the 1st Day of April, 1908.

This day came the defendant by counsel, and moved the Court to remand the above styled action; To which the plaintiff objects. And the Court being advised ordered that - - be and is overruled; To which the defendant excepts.

Again came the defendant by counsel and moved the court for leave to withdraw its motion to remand the above styled action; To which the plaintiff objects.

And the Court being advised overruled said objection and sustained said motion and said motion to remand this action is now withdrawn; To all of which the plaintiff excepts.

Came the defendant, the Western Life Indemnity Company, of Illinois, with leave of court for the purpose of making this motion and for this purpose alone, hereby enters its special appearance and in writing filed moves the Court to squash the return on the summon herein; To which the plaintiff objects.

10 On motion of the defendant by counsel, ordered that he be and is given until April 4th, 1908 to file affidavits herein.

On motion of the plaintiff, by counsel, ordered that he be and is given until April 7th, 1908 to file affidavits herein.

Said motion filed on the 1st day of April, 1908 is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY CO., Defendant.

Motion.

The defendant, the Western Life Indemnity Co., of Illinois, with leave of Court for the purpose of making this motion and for this purpose alone, hereby enters its special appearance and moves the Court to quash the return on the summons herein.

BECKLEY & SCOTT.
Attorneys for Western Life Indemnity Company.

11 At a Court Held on the 2nd Day of April, 1908.

Came the defendant by counsel, and filed the affidavit of Pendleton Beckley herein.

Said affidavit is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Affiant, Pendleton Beckley, states that he is a member of the firm of Beckley & Scott, practicing attorneys of the Louisville Bar; that on the morning of Wednesday, April 1st., he appeared before His Honor, Judge Thomas R. Gordon, presiding over the Common Pleas Branch, Second Division of the Jefferson Circuit Court. That theretofore, to-wit, on Saturday, March 28, in the above styled action, the plaintiff had made a motion for a judgment and His Honor Judge Gordon had passed the same to Wednesday morning, for the hearing of said motion. Affiant states that on said Wednesday morning at the hearing of said motion he stated that when the case had been called on Saturday morning preceding that he had said his firm represented the said defendant company in certain other matters, but had no authority to represent said company in this action. Whereupon His Honor passed said action on

12 said motion for judgment until Wednesday as aforesaid. Affiant further states that on Wednesday morning, April 1, 1908, he stated to His Honor, Judge Gordon, that he had examined the record on Saturday, and that there was no process therein; that the rule docket contained no record of said service, and that neither the Clerk of the Jefferson Circuit Court, the Deputy Clerk of the Common Pleas Branch, Second Division, nor the Sheriff of Jefferson County, could give any information concerning the process in said action; that after the calling of said case on Saturday, the attorney for the plaintiff had given to the Deputy Clerk of the Common Pleas Branch, Second Division, a process with a return thereon which purported to be served upon the Commissioner of Insurance of Kentucky. Affiant states that he stated these facts to the Court, and suggested that the said case be remanded, meaning thereby that the Court should remand the case on its own motion.

Affiant further states that any words used by affiant in regard to the remanding of said case, were intended to convey the idea that the action should be remanded by the Court because there was no return of process in the record or in the papers of the case, when the same was set upon the docket for Saturday, or when the same was passed to April 1st., on motion for judgment as aforesaid. Affiant further states that he had only prepared an entry of special appearance of said defendant company and a motion to quash the return on said summons; that he stated to the Court that he was present

on behalf of said Company for the purpose of making this
13 motion and no other; that he did not intend to make a motion to remand the case on behalf of the defendant company; that by his statement to His Honor as aforesaid and by his remarks in regard to said statement, he only meant that he was of the opinion that the case should be remanded, and affiant ask- that said motion to remand said case, if His Honor conceives the same to be a motion made under misapprehension, as aforesaid, be stricken from the record as erroneous and that defendant be allowed to enter its special appearance herein and file its motion to quash the return on the summons. Affiant states that he had authority from defendant company only to file the motion to quash the return on the summons as aforesaid, and no other authority to represent said defendant in any manner at said hearing.

PENDLETON BECKLEY.

Affiant, Pendleton Beckley, states that the statements contained in the foregoing affidavit, are true as he believes.

PENDLETON BECKLEY.

Subscribed and sworn to before me this 1st day of April, 1908. My commission expires the 29th day of January, 1912.

MINNIE SCHENKEL,
Notary Public, Jefferson County, Ky.

At a Court Held on the 4th Day of April, 1908.

Came the defendant by counsel, and filed the affidavit of
14 Pendleton Beckley herein.

On motion of the defendant by counsel, ordered that it be and is given one week in which to file additional affidavits herein.

Said affidavit is as follows:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Affidavit of Pendleton Beckley.

Affiant, Pendleton Beckley, states that he is a member of the firm of Beckley & Scott, practicing attorneys at the Louisville Bar; that said firm has transacted certain business at the instance and request of one Thomas J. Graydon, an attorney of Chicago, Ill., and affiant is informed that said Thomas J. Graydon is the attorney for the Western Life Indemnity Co., of Illinois, defendant in this case. Affiant states that said Western Life Indemnity Co., is a corporation organized and existing under the laws of the State of Illinois; that said Western Life Indemnity Co., as affiant is informed and believes at or about the time the policies herein sued on were issued

by said Western Life Indemnity Co., Said Western Life Indemnity Co., had applied to the Superintendent of Insurance of the State of Kentucky for a license to transact its business in accordance with the laws of this State; and in case such license was issued, to
15 appoint said Superintendent of Insurance its agent for service of process in the State of Kentucky; that said application for a license was pending for some time and that it was during the time the defendant company was so in good faith intending and attempting to comply with the laws of this State and to be duly licensed in the State of Kentucky, that the making of said contracts or policies herein sued on were entered upon.

Affiant further states that a license to do business in the State of Kentucky was not issued to said company by the Insurance Commissioner of said state; that said defendant company did not file with the Commissioner a resolution adopted by its Board of Directors consenting that service of process be made upon any agent of such company in this State or upon the Commissioner of Insurance of this State or that said service should be a valid service upon said Company.

PENDLETON BECKLEY.

Subscribed and sworn to before me by Pendleton Beckley this 3rd day of April, 1908. My commission expires the 29th day of January, 1912.

MINNIE SCHENKEL,
Notary Public, Jefferson County, Ky.

At a Court Held on the 7th Day of April, 1908.

Came the defendant by counsel, and filed the affidavit of George M. Moulton herein.
16 Said affidavit is as follows:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Affidavit of George M. Moulton.

Affiant George M. Moulton, states that he is the President of the Western Life Indemnity Company, of Chicago, Illinois, and resides at said City of Chicago; that he has knowledge of the matters and things herein stated and makes this affidavit for and in behalf of said Company; that said Western Life Indemnity Company is a Corporation organized and doing business under an Act of the Legislature of the State of Illinois providing for the incorporation of companies to do the business of Life and Accident insurance on the assessment plan.

Affiant further states that said Western Life Indemnity Company before the making of the contract of insurance herein sued upon

had expected and desired to be admitted to transact business in the State of Kentucky according to the laws thereof that its application for such license to do business was rejected by the Insurance Department of said State of Kentucky; and said Western Life Indemnity Company never appointed said Superintendent of Insurance its agent for services of process in said State of Kentucky and never consented that said Superintendent of Insurance might be served with or accept such service on said Company's behalf; and that
17 said Superintendent of Insurance of the State of Kentucky has not now and never has had authority for or on behalf of said Western Life Indemnity Company to be served with or to accept process of service in the State of Kentucky.

Affiant further states that at the time said Company first took up the matter of procuring business in said State of Kentucky and thereafter it in good faith expected that a license to engage in business in said State of Kentucky would be issued to it; that the applicaion above referred to, to the Insurance department of said State of Kentucky was made in pursuance of such intention; and that had not said Company so expected to be licensed according to the law to transact business in said State of Kentucky, said Company never would have considered the taking of any insurance business on its behalf from said State of Kentucky.

Affiant further states that said Company or its officers had no knowledge of the pendency of said above entitled action until Monday, March 30th, 1908, when affiant was shown a letter written by Messrs. Beckley and Scott, Attorneys of Louisville, Kentucky, which letter was addressed to Thomas J. Graydon, an attorney of Chicago, who had represented said defendant Company in certain matters; that said letter from Beckley and Scott stated that said action had accidentally come to the notice of said Beckley and Scott and that it was claimed that service therein had been had on the Insurance Commissioner of the State of Kentucky for and on behalf of defendant; that up to said 30th day of March 1908, defendant had had absolutely no knowledge that such action had been begun and
18 has had no notice of said action since said 30th day of March or at any other time from any person whomsoever except said Beckley and Scott, Attorneys as above stated and from said Thomas J. Graydon.

GEORGE M. MOULTON.

STATE OF ILLINOIS,
County of Cook, ss:

Subscribed and sworn to before me by George M. Moulton this 4th day of April, 1908. My commission expires on the 17th day of Dec., 1908.

W. N. HISLOP,
Notary Public, Cook County, Illinois.

At a Court Held on the 16th Day of May, 1908.

The Court being sufficiently advised, it is considered and adjudged that the motion of the defendant to quash the return on the summons herein be and is overruled, to which the defendant excepts.

At a Court Held on the 23rd Day of May, 1908.

This action was set at rules by the plaintiff on the 18th inst.
On motion of the defendant, by counsel, ordered that this action be and is remanded to the rules.

19 At a Court Held on the 30th Day of May, 1908.

This action was set at rules by the plaintiff on the 25th inst.
Came the defendant, by counsel and filed its answer herein.
On motion of the defendant, by counsel, ordered that this action be and is remanded to the rules.

Jefferson Circuit Court, Common Pleas Branch, Second Division.

#48871.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY CO., Defendant.

Answer.

The defendant, the Western Life Indemnity Co., without waiving its objection to the jurisdiction of this court of its person, says that it did not file with the Commissioner of Insurance a resolution of its Board of Directors consenting that service of process be had upon said Commissioner of Insurance.

It says that said Commissioner of Insurance had no power to consent to service of process in this action and was not the agent of this defendant for service of process at the time of said service herein or at any time.

Paragraph II.

20 The defendant, Western Life Indemnity Co., reiterating its plea to the jurisdiction of this court and objecting to the ruling of the court in regard to its jurisdiction of the person of this defendant, further answering admits that on the — day of September, 1907, one George McCormick applied to this defendant for a policy of insurance on his life in the sum of $1,000.00, but denies that on the 7th day of September, 1907, said defendant company accepted said application or in consideration of $54.76 or any sum paid to it by the said George McCormick issued or delivered to said George McCormick an insurance policy No. 23870 on the life of said George McCormick for $1,000.00.

Defendant denies that it undertook to and did insure the life of said George McCormick for the sum of $1,000.00 for the period of twelve months or at all; and denies that by or under the instruction of the said George McCormick, the said defendant issued said policy

payable to said plaintiff without plaintiff's intention, request or knowledge. Defendant says it has no knowledge or information sufficient to form a belief and therefore denies that the said McCormick died on the 18th day of October, 1907, and denies that due notice or proof of his death was furnished to this defendant under any policy of insurance. Defendant company denies that it has broken or violated any contract between said plaintiff and defendant or that it is indebted to plaintiff in the sum of $1,000.00, under any contract of insurance. Defendant says that it has no knowledge or information sufficient to form a belief and therefore denies that the said George McCormick was an uncle to said plaintiff herein, or that he had no wife or children or was largely dependent upon plaintiff or that he lived in a house of said plaintiff or at any time did work for plaintiff.

21 Defendant for further answer to paragraph II admits that on the — day of September, 1907, one George McCormick applied to this defendant for a policy of insurance on his life in the sum of $1,000.00, but denies that on the 20th day of September, 1907, the said defendant company accepted said application or in consideration of $54.76 or any sum paid to it by the said George McCormick issued or delivered to said George McCormick a policy No. 23892 on the life of the said George McCormick for $1,000.00; denies that in consideration of the said sum it undertook to or did insure the life of said George McCormick for $1,000.00; denies that by the direction of or under the instructions of said George McCormick the defendant issued said policy payable to said plaintiff and denies that same was done without plaintiff's intention, request or knowledge, and defendant company says it has no knowledge or information sufficient to form a belief and therefore denies that the said McCormick departed this life on the — day of — 1907, or that due notice and proof of his death was furnished the defendant.

Paragraph III.

Defendant for further answer states that prior to the issuance of said policies to the said George McCormick the said George McCormick furnished to said defendant his written application which was to be and did thereby become the basis of the issuance of any policy issued thereon. Defendant states that said application is in words and figures as follows, to-wit:

Form 63. Sept. 20, 1907. 23892. No. 781.

Application to the Western Life Indemnity Co., Masonic Temple, Chicago.

1. Application of George McCormick for life insurance.
22 Residence 1462 High Ave. Jefferson Co. Ky. Louisville, Ky.

2. Occupation or Employment and location of same. Stable boss Jefferson Co., Ky.

3. Former occupation and residence. City Works repairs.
4. Place and date of your Birth? Ky. 25 Nov. 1849.
5. My age at my nearest birthday is therefore 58 years. Are you single? Single.
6. Full name of the person for whose benefit the insurance is desired. Clarence Rupp. Relationship to yourself Nephew.
7. Have you ever applied for insurance in this Company? No. If so, what is the number and amount of each policy issued?
8. Is your life now insured in any other company? If so, in what companies and for what amount? Yes #23870 for $1000.00.
9. Have you ever applied to any company or association for insurance without receiving a policy of the exact kind and amount applied for? No.
10. Is any negotiation for other insurance now pending or contemplated? No.
11. Policy-amount $1000.00. Kind W. L. non part. with an annual premium of $54.76.
12. Have you paid the Agent taking this application the premium on the same? No will pay on delivery.

This Application, Made to the Western Life Indemnity Company of Chicago, is the basis and a part of a proposed Contract for Insurance subject to the charter of the Company and the laws of the State of Illinois. I hereby agree that all the foregoing statements and answers, and all those that I make to the Company's Medical Examiner in Part Two of this applicaton are by me warranted to be true, and are offered to the Company as a consideration of
23 the contract, which I hereby agree to accept, and which shall not take effect until the first premium shall have been paid, during my continuance in sound health, and the policy shall have been executed and issued by the Company. I further agree that in any distribution of surplus the principle and methods which may then be in use by the Company, for such distribution, and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in the contract.

I hereby Warrant and Agree and during one year following the date of issue of the Contract of Insurance, for which application is hereby made, that the liability of the Company shall be limited to the amount of Premiums paid on this policy should I engage in any of the following extra hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad freight train or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the Company: That I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue.

I Further Agree to accept and abide by the by laws, rules and

regulations of the Company, as they now are or may be lawfully changed hereafter.

Dated at Louisville, Sept. 1, 1907.

—— ——, *Agent.*

Signature of person or persons soliciting and securing application.
T. T. O'LEARY, *Manager.*

Signature of person whose life is proposed for insurance:
His
GEO. x McCORMICK.
mark

24 Defendant states that upon the receipt of said application as aforesaid and relying upon the facts therein stated, said defendant company through its agents, caused the said George McCormick to be examined by its medical examiner and that the said examination was made by a regular practicing physician in Louisville, Ky. Defendant states that in the application the said George McCormick states that his occupation was that of a stable boss and that his age at his nearest birthday was 58 years. Defendant states that said statement- in said application were untrue and said defendant states that had it known the said statements in said application were untrue, the policy herein sued on would not have been issued by said defendant company.

Defendant states that the statement of said George McCormick in regard to his occupation and his age were material and that if the true age of the said George McCormick had been given, said company would not and could not have issued the policy herein sued on.

Defendant company further answering says that the said George McCormick had no regular vocation and defendant denies that the said plaintiff had an insurable interest in the life of the said George McCormick.

Paragraph IV.

Defendant company further answering plaintiff's petition herein, states that the said plaintiff caused the said George McCormick to make the application for the insurance herein sued on for his own benefit, and caused the said George McCormick to be examined for said insurance and that said plaintiff paid a portion of the premiums thereon, and that the said contracts of insurance which it is alleged were entered into by and between the said George McCor-
25 mick and the said defendant company, were and are void because the plaintiff did not have at said time or at any time an insurable interest in the life of the said George McCormick. Defendant states that said contracts of insurance were wagering contracts on the part of said plaintiff and defendant company did not know, and could not know of said facts in connection with the issuance of said policies at the time said policies were issued.

Defendant for further answer states that one T. T. O'Leary at the

time said application was made to said company was an insurance broker or agent in the City of Louisville, and that said application was made by and with the connivance of the said T. T. O'Leary and the plaintiff herein and that the said T. T. O'Leary and the said plaintiff knew that if the correct age was given by the said George McCormick, said defendant company would not and could not have issued any policy of insurance upon the life of said McCormick. Defendant further states that said statement in the said application that the said George McCormick had a vocation was untrue, and was known to the said plaintiff herein and to the said T. T. O'Leary, and that said statement was material.

Defendant further says that the policies or contracts herein sued on were procured by fraud and misrepresentaton by the said plaintiff and that said contracts were and are void.

Paragraph V.

Defendant further answering says that at the time said application upon which the policies herein sued on were issued, was made, one T. T. O'Leary was acting as an insurance broker in
26 the City of Louisville. Defendant states that the said O'Leary and the said Clarence Rupp, the plaintiff herein, for their own benefit insured the life of the said George McCormick, deceased; that the full annual premium- on the policies herein were not paid by the said George McCormick and were not paid by the said Clarence Rupp, but that the said T. T. O'Leary rebated a large portion thereof and defendant says that the said T. T. O'Leary and the said Clarence Rupp thus acting and conspiring together, obtained the policies herein sued on on the life of the said George McCormick, and that the said Clarence Rupp and the said T. T. O'Leary knew that the statements mentioned in said application in regard to the age of the said George McCormick were untrue and that if the true age of the said George McCormick had been given, the said defendant company would not and could not have issued the policies herein sued on.

Defendant further states that it was provided in each of the policies herein sued on that neither of said policies would take effect or could take effect until the first premium had been actually paid during the life time and sound health of the insured and defendant states that the first premium on the policies had never been delivered during the life time and sound health of the said George McCormick. Defendant states that under the laws of the State of Kentucky, no contracts of insurance can be entered into in said state except upon the payment of Certain premiums or rates charged to all individuals of the same class and equal expectation of life, and defendant states that without its knowledge and consent and against its rule, and will and consent, and against the laws of the State of Kentucky, the said T. T. O'Leary rebated and returned and credited the said Clarence Rupp herein with a portion
27 or portions of the premium on the said policies mentioned herein and defendant states that said Statute in the State of Kentucky is as follows, Section 656:

"Discrimination and rebates forbidden—contract to be same as policy penalty. No life insurance company doing business in Kentucky shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for the policies of life or endowment insurance, or in the dividends or other benefit payable thereon, or any other of the terms and conditions of the contracts it makes; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy — contract of insurance. Every company, or officer or agent thereof, who shall violate the provisions of this section, shall be fined in any sum not exceeding five hundred dollars, to be recovered by action in the name of the Commonwealth, and, on collection paid into the State Treasury".

Defendant states that the applications for the policies herein sued on were made in pursuance of said unlawful agreement between said O'Leary and the said Clarence Rupp, and the said George McCormick and the said policies are void and illegal and
28 to hold the defendant liable and responsible for said illegal acts of the said O'Leary and the said Rupp and the said McCormick would be a fraud upon said defendant company and contrary to the laws of the State of Kentucky as herein set forth.

Wherefore having fully answered the defendant, the Western Life Indemnity Company asks to be dismissed, hence with its costs.

BECKLEY & SCOTT,
Attorney- for Defendant.

At a Court Held on the 6th Day of June, 1908.

This action was set at rules by the plaintiff on the 1st, inst.

Came the plaintiff by counsel, and on written motion filed moves the court to strike from the fourth paragraph of the defendants answer certain parts therein; To which the defendant objects.

Again came the plaintiff by counsel, and on written motion filed moves the court to require the defendant to further paragraph the second, fourth and fifth paragraphs of its answer herein; To which the defendant objects.

Again came the plaintiff by counsel, and — written motion filed moves the court to require the defendant to elect which cause of defense it will rely upon, the negative defense set up in the second paragraph, or the affirmative defense plead in the third paragraph of the answer herein; To which the defendant objects.

29 Again came the plaintiff by counsel, and filed a demurrer to the first, third, fourth and fifth paragraphs of the defendants answer herein.

And the court not being advised, ordered that said motion and demurrer be and are submitted.

Said motions filed on the 6th day of June, are as follows to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Motion.

Plaintiff moves the Court to require defendant to further paragraph the second, fourth and fifth paragraphs of its answer herein.

EDWARDS, OGDEN & PEAK,
Attorneys for Plaintiff.

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Motion.

Plaintiff moves the Court to require the defendant to elect which cause of defense it will rely upon, the negative defense set up in the second paragraph, or the affirmative defense plead in the third paragraph of the answer herein.

EDWARDS, OGDEN & PEAK,
Attorneys for Plaintiff.

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Motion.

The plaintiff moves the Court to strike from the fourth paragraph of the defendant's answer the following part thereof.

"Defendant for further answer states that one T. T. O'Leary at the time said application was made to said Company was an insurance broker or agent in the City of Louisville, and that said application was made by him and with the connivance of the said T. T. O'Leary and the plaintiff herein, and that the said T. T. O'Leary and the said plaintiff knew that if the correct age was given by the said George McCormick said defendant Company would not and could not have issued any policy of insurance upon

the life of said McCormick. Defendant further states that
31 said statement in the said application that the said George McCormick had a regular vocation was untrue, and was known to the said plaintiff herein and to the said T. T. O'Leary, and that said representation was material.

Defendant further says that the policies or contracts herein sued on were procured by fraud and misrepresentation by the said plaintiff and that said contracts were and are void and the following part from the fifth paragraph:

Defendant further answering says that at the time said application upon which the policies herein sued on were issued was made one T. T. O'Leary was acting as an insurance broken in the City of Louisville. Defendant states that the said O'Leary and the said Clarence Rupp, the plaintiff herein, for their own benefit insured the life of the said George McCormick deceased; that the full annual premium on policies herein were not paid by the said George McCormick and were not paid by the said Clarence Rupp, but that the said T. T. O'Leary rebated a large portion thereof and defendant says that the said T. T. O'Leary and the said Clarence Rupp thus acting and con-spiring together obtained the policies sued on the life of the said George McCormick, and that the said Clarence Rupp and the said T. T. O'Leary knew that the statements mentioned in said application in regard to the age of the said George McCormick were untrue and that if the true age of the said George McCormick had been given the said defendant company would not and could not have issued the policies herein sued on".

EDWARDS, OGDEN & PEAK.
Attorneys for Plaintiff.

32 Said Demurrer is as follows:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Demurrer.

The plaintiff demurs to the first, third, fourth and fifth paragraphs of the answer because said paragraphs, or either of them, do not state facts sufficient to constitute or support a defense to this action.

EDWARDS, OGDEN & PEAK.
Attorneys for Plaintiff.

At a Court Held on the 27th Day of November, 1909.

The Court being sufficiently advised delivered a written opinion herein, which is ordered to be and is now filed and made a part of the record herein.

And in pursuance to said opinion it is considered, ordered and adjudged that the demurrer to the answer herein be carried to the petition herein, and sustained; To which the plaintiff excepts.

33 Said Opinion is as follows:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

No. 48871.

CLARENCE RUPP, Plaintiff,
v.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Opinion.

1909, NOVEMBER 27.

This case is before the court upon motions to strike and upon demurrers to the several paragraphs of the answer. The demurrers to the answer render it proper and necessary to determine the sufficiency of the petition, which has not been demurred to and the sufficiency of which is now for the first time raised.

The policies of insurance were taken on the life of one George McCormick, the plaintiff, Clarence Rupp, a nephew being designated as beneficiary. Thus the question must be decided, Has a nephew an insurable interest in the life of his uncle?

This court considered and reviewed the authorities upon insurable interest in the case of Kate Baily v. Metropolitan Life Ins. Co., No. 47456, and filed an opinion giving reasons for holding that a sister had an insurable interest in the life of a brother based upon the relationship alone.

The authorities there cited, and the general concensus of the authorities, are to the effect that insurable interest based upon relationship will not be extended beyond that. It is expressly held that the relationship of uncle and nephew is not sufficient to take a policy out of the class of wagering contracts. In Cooley's Brief on Insurance, vol. 1, p. 290, it is said: "The relationship or
34 uncle or aunt and nephew or niece will not support an insurable interest." A long list of authorities are cited in support of the text. May on Insurance, Sec. 107 (S), p. 190, 4th ed., is to the same effect. Joyce on Insurance, Sec. 1069, states: "Neither uncle nor nephew has an insurable interest in the other's life by force merely of the relationship, and a policy of insurance procured by an uncle in his own favor upon the life of his nephew, in which he has no pecuniary interest, is void."

It seems to the court that both upon principle and a sound public policy, as well as upon the decided cases, it must be concluded that the relationship of uncle and nephew will not sustain insurable interest. It is also settled in this State that one who cannot take out the policy because of lack of interest cannot hold it if assigned to him after it is issued.

The petition alleges that the insured had no wife or child, "was largely dependent upon this plaintiff, and he lived in a house of this plaintiff, and at times did work for this plaintiff." It seems to the court that these alleged facts fall far short of stating a condition under which the plaintiff had reasonable expectation of pecuniary benefit from the continuation of the life of the insured. It does not appear that the beneficiary was a creditor. If so, his interest could be only to the extent of his indebtedness. It does not appear that either upon relationship or as creditor the nephew had insurable interest in the uncle's life.

We are brought however, squarely up to the question, "Can one procure a policy upon his own life for the benefit of another who has no insurable interest in the life of the insured?

It may be admitted that by the weight of authority in other States it is held that this may be done. It seems clear that under the Kentucky authorities it may not be done.

35 In Caudell v. Woodward, 96 Ky., 651, Judge Hazelrigg, writing, it is said: "Nothing is better settled in this State than that one obtaining a policy of insurance on the life of another must have an insurable interest in the life of that other. It is said, however, that the appellant did not in fact obtain the insurance; that the insured voluntarily did so for the other's benefit; it may be that in this case all the dangerous features are as a matter of fact wanting, never-the-less, the dangerous principle remains.

If the law denouncing speculative insurance may be avoided by simply having the insured voluntarily take out on his life a policy of insurance payable to his friend, we may soon witness a similar state of case in our criminal courts as is now being heralded by the daily press in States where the courts have been more liberal in construing the law of insurable interest. As has been well said, such a system of insurance is an incitement to murder that is irresistible by persons of large greed and small conscienciousness. The cases of Basye v. Adams, 81 Ky., 368, and Leaf v. Leaf, 92 Ky., 166, are corroborative of these views."

In New York Life Ins. Co. v. Brown's Adm'r, 23 Ky., Law Rep. 2072, the court, through Judge Burnam, says:

"There is great diversity of opinion in courts of last resort as to the right to take out life insurance for the benefit of a stranger. Many of the courts hold that where a person obtains a policy on his life and pays the premium himself, he may make the policy payable to one who has no insurable interest in *this* life and by so doing no rule of law or public policy would be violated (citing cases). But in this case the rule is well established that no one can enforce a policy of insurance issued upon the life of another without

36 having an insurable interest in the life of such person." Citing Basye v. Adams, 81 Ky., 368, and Beard v. Sharp, 100 Ky., 611.

In Beard v. Sharp, 100 Ky., 611, the court says: "It has often been held by this court that a party who has no insurable interest in the life of another cannot sue for or recover that he can only collect

and hold the insurance money to the extent that the deceased may be indebted to him."

In Barber's Adm'r v. Larue's ass'e 106 Ky., 559, the court quotes Sec. 655 Ky. Stat., passed as early as 1870, which provides: "When a policy of insurance is affected by any person on his own life, or on another life in favor of some person other than himself, having an insurable interest therein, the lawful beneficiary thereof other than himself or his legal representatives, shall be entitled to its proceeds against the creditors and representatives of the same * * *." The court saying: "Thus clearly authorizing any person to take out a policy on his own life for the benefit of another having an insurable interest therein, and securing the proceeds thereof to such beneficiary." Limiting the authority clearly to such beneficiary as has an insurable interest.

In Embry's Adm'r v. Harris, 107 Ky., 65, the court says Public policy forbids any person save one who has an insurable interest in the life insured from having or acquiring any interest in the contract of insurance.

In Steinback v. Diepenbrock, 37 N. Y. Supp., 279; 44 L. R. A., 419, opinion by Judge Parker, it is said, discussing the assignability of a policy to one not having insurable interest and upholding the right, after citing a number of authorities:

"These authorities are, it seems to us, well grounded in principle. They recognize not only the existence of, but the necessity for, the rule that forbids any insurance upon the life of a person in which the person for whose benefit the insurance is made has no interest. Such a policy constitutes what is termed a 'wager policy,' or a mere speculative contract upon the life of the insured, with a direct interest in its early termination * * *

But the question we are considering presupposes a valid contract of insurance, the policy being issued for the benefit of the insured personally, or for the benefit of some one having an insurable interest in the insured at the time of taking out the policy * * * while an insurable interest in the payee is necessary in the first instance to the creation of a valid contract, it is not necessary that such interest should continue." This case is referred to and cited by Judge Hobson in Brumley v. Washington Life Ins. Co., 122 Ky., 405.

This doctrine if not announced seems to be recognized in Bramblett vs. Hargis' Ex'tx, 123 Ky. 145. Judge Carroll (then Commissioner) writing, where the court in approving Basye vs. Adams 81 Ky., quotes from that case, approvingly, a quotation from Warnock vs. Davis, 104 U. S. 775, in part as follows:

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. We are unable to see why the rule recognized by all the authorities as applicable to, and which renders invalid because against public policy, policies of life insurance taken for the benefit of the party having no insurable interest in the life of the person in whose name it is issued, should not be also invalid as to an assignment of the policy where the assignee has no such insurable interest.

The question before the court in the case at bar is not necessarily whether or not the policy is void, but whether or not a stranger having no insurable interest can recover upon it. An insurance company which will issue a policy to one it knows to have no
38 insurable interest asks with poor grace that it shall be freed from liability, unless indeed the policy is a "wager contract" in fact, and the courts will be ready indeed to enforce payment if the designation of such beneficiary was made in good faith; and so in the case of N. Y. Life Ins. Co. v. Brown's Adm'r, 23 K. L. R., 2072, the court says: "But it is equally well settled that the contract of insurance is not violated by the designation of a person prohibited by law from being the beneficiary." Citing Caudell vs. Woodward, Supra, and Weigelman vs. Bronger, 96 Ky., 132.

The question as to whether the policy can be enforced for the benefit of the real representative of the deceased, and if so how? or whether or not it can be enforced for the benefit of the personal representatives, and if so how? are not now before the court. The Texas Court has dealt*h* intelligently with this question. See Cooley's Briefs on Insurance, p. 255.

Hess v. Segenfelter, &c., 127 Ky., 351, is cited to the court as decisive of this case. There the court, through Judge Carroll, holds that the statute as to members of a fraternal or benevolent association forbade the designation of one having no insurable interest as beneficiary. The case was decided upon the question of the effect of the statute, and upon nothing else. It is true the learned Judge says that but for the statute the court would decide the question otherwise. But even with this statement in the opinion, I deem it my duty to follow the long line of decisions of the Court of Appeals, leaving it for that court to turn aside from and change the established doctrine in this State.

It follows that the demurrer to the answer is carried back to the petition and sustained, to which plaintiff excepts.

THOS. R. GORDON, *Judge*.

39 At a Court Held on the 18th Day of December, 1909.

This action was set at rules by the plaintiff on the 13th inst.

This day came the plaintiff by counsel, and declined to plead further herein; thereupon it is ordered by the court that the plaintiff- petition herein be and is dismissed, and that the defendant recover of the plaintiff its costs herein expended for which it may have execution; To all of which the plaintiff objects and excepts, and prays an appeal to the Court of Appeals which is hereby granted.

——— ———.

Jefferson Circuit Court, Common Pleas Branch, Second Division.

48871.

CLARENCE RUPP, Plaintiff.
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Schedule.

The Clerk of the Jefferson Circuit Court is hereby directed and instructed in making a transcript of the record in this case to copy all the pleadings and exhibits filed with each pleading, and all the orders and processes of the Court in this action.

EDWARDS, OGDEN & PEAK,
Att'ys for Plaintiff.

40 Notice of the filing of the above schedule is waived.

BECKLEY & SCOTT,
Att'ys for Defendant.

1910, January 7.

Filed in Clerk- office.

Attest:

LOUIS SUMMERS, *Clerk*,
By JNO. H. PAGE, *D. C.*

41 STATE OF KENTUCKY,
County of Jefferson:

I, Louis Summers, Clerk of the Jefferson Circuit Court do hereby certify that the foregoing 40 pages contain a full true and complete transcript of the record and proceedings in the action wherein Clarence Rupp, is plaintiff and Western Life Indemnity Company is defendant, #48871, as the same appears of record and now on file in my said office.

Witness, Louis Summers, Clerk of said Court this 18 day of March, 1910.

LOUIS SUMMERS,
Clerk Jefferson Circuit Court.

Fee, $17.50.

42 At the same time, to-wit—on March 21st, 1910, there was filed with the foregoing transcript the following statement of parties and of the appeal:

Court of Appeals of Kentucky.

CLARENCE RUPP, Appellant,
vs.
WESTERN LIFE INDEMNITY COMPANY, Appellee.

Statement.

The judgment appealed from in this case was rendered by the Jefferson Circuit Court, Common Pleas Branch, Second Division on the 18th day of December, 1909.

The Judgment appealed from will be found on page 39 of the record.

No Summons or warning order is required.

Beckley & Scott, Louisville Trust Building, Louisville, Ky. are Attorneys for Appellee.

Edwards Ogden & Peak, Kentucky Title Building, Louisville, Ky. are Attorneys for Appellant.

EDWARDS, OGDEN & PEAK,
Att'ys for Appellant.

43 Afterward at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in Frankfort, on the 19th, day of April, 1910 the following order was entered, to-wit:

Rupp vs. Western Life Indemnity Co., Jefferson.

Ordered that this case be submitted.

Afterwards at a Court of Appeals held as aforesaid, on the 26th, day of April, 1910, the following orders and judgments were entered herein:—

CLARENCE RUPP, Appellant,
vs.
WESTERN LIFE INDEMNITY COMPANY, Appellee.

Appeal from the Jefferson Circuit Court, Common Pleas Branch, Second Division.

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said Court.

It is further considered that appellant recover of appellee all his costs herein expended.

At the same time the Court of Appeals of Kentucky delivered an opinion herein in words and figures as follows, to-wit:—

44 Court of Appeals of Kentucky.

April 26, 1910.

(To be Reported.)

CLARENCE RUPP, Appellant,
vs.
WESTERN LIFE INDEMNITY COMPANY, Appellee.

Appeal from Jefferson Circuit Court (Common Pleas, Second Division).

Opinion of the Court by Judge Nunn.

Appellant, Clarence Rupp, brought this suit against appellee, Western Life Indemnity Co., on two policies of insurance alleged to have been issued upon the life of his uncle, Geo. McCormack, appellant being named in both policies as the beneficiary. The petition is in two paragraph, in each of which it is sought to recover $1,000.00, the amount of each of the policies, and is in the form usually employed in bringing such actions, except it is alleged that,

45 "by the directions and under the instructions of the assured, George McCormack, the defendant issued the policies payable to this plaintiff and this without this plaintiff's instance, request or knowledge."

Appellee's answer was composed of five paragraphs; to some of which a demurrer was filed but never acted upon as to the answer, but was carried back to and sustained as to the petition. Plaintiff declined to amend his petition and the court dismissed it upon the ground that appellant, a nephew of McCormack, had no insurable interest in his uncle's life; that such a contract partook of the nature of a wager and was void as being against public policy. And this is the only question necessary or proper to be considered upon this appeal.

This court has held in several cases that a person could not take out an insurance policy on the life of another, pay the premiums and become himself the beneficiary, unless he had an insurable interest in the life of the person insured for the reason that such would be a wagering contract and violative of public policy. The court did not hold such contract of insurance void, but only held that such person who had no insurable interest and obtained

46 the policy and paid the premiums thereon could not collect it. This, however, is not the question before us. The point is: Has a person a right to obtain a policy, pay the premiums and name any person he wishes as beneficiary? This is the first time this question has been brought directly before this court. Appellee's counsel contend that such a policy can not be enforced, even though the beneficiary named in the policy had nothing to do with procur-

ing it and was ignorant of its *issual,* and cite the following Kentucky cases, which they claim support their position: Caudell vs. Woodward, 96 Ky., 646; Leaf vs. Leaf, 92 Ky., 166; Embry's Admr. vs. Harris, 107 Ky., 65; Griffin's Admr. vs. Equitable Assurance Society, 119 Ky., 856, and Schlamp vs. Berner's Admr., 21 Ky. L. R., 324. The question before us was not in issue in any of the cases cited and was not considered, except by a slight reference in the first styled case. The opinions in the first two cases referred to construe contracts of insurance issued by what are known as "assessment or benevolent associations," and the court decided them upon the construction of the organic law governing these associations. In the case of Embry's Admr. vs. Harris, supra, Harris as the surety of Embry to a bank for nearly $4,000.00, obtained a policy
47 on the life of Embry payable to his (Embry's) estate for the sum of $5,000.00, and the policy was placed in the hands of Harris to indemnify him against loss as such surety. The court upheld that contract. In the case of Schlamp, &c. vs. Berner's Admr., supra, Mary Berner took out a policy on her life which was made payable to her administrator. She afterwards assigned the policy to her cousin, Barbara Schlamp. The court held that Barbara Schlamp had no insurable interest in the life of Mary Berner and took no interest in the policy by reason of the assignment of the policy to her. It will be observed that these opinions do not touch the question before us, except the Caudell case, which we will refer to hereafter. The exact question before us was thoroughly considered in the case of Hess' Admr. vs. Segenfelter, &c., 127 Ky., 348. The policy in that case was issued by a benevolent association and the opinion was based upon and controlled by sections 678 and 680 of the Kentucky Statutes; but the question at bar was thoroughly considered and the following conclusion announced:

"All the courts of last resort, with possibly one exception, and the text-writers on insurance generally, are agreed that a person
48 may take out insurance on his own life and designate whom he pleases as the beneficiary. This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life for the purpose of speculation, or be tempted to take his own life, in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction and not in the continuance of his own life. Vance on Insurance, section 49; Heinlein v. Imperial Insurance Co., 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; Morrell v. Trenton Mutual Life Ins. Co. 10 Cush, 282, 57 Am. Dec. 92; Connecticut Mutual Life Insurance Co. vs. Schaefer, 94 U. S. 457, 24 L. Ed. 251; May on Insurance, section 112; Bliss on Insurance, section 76; Bacon on Insurance, section 729; Beach on Insurance, section 861; Joyce on Insurance, section 729; Bloomington Mutual Benefit Association v. Blue, 120 Ill., 121, 11
49 N. E. 331, 60 Am. Rep. 558; Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52

N. E. 772, 69 Am. St. Rep. 380; N. W. Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Albert vs. Mutual Life Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693. On the other hand what is known as 'wagering or gambling insurance' is universally condemned, and our court, in harmony with the doctrine generally prevailing, is strongly committed to the principle that a person cannot himself procure insurance upon a life in which he has no insurable interest, growing out of kinship, dependency, or the relation of debtor and creditor, nor obtain an assignment of such insurance; nor will a person be permitted to insure his own life for the benefit of another, if that other induces him to procure the insurance and pays the premiums thereon, or there is any evidence tending to show that the insurance was obtained with a view to avoid or evade the law against speculative insurance."

This is a sound and reasonable rule, and if it were otherwise it would be in conflict with the universal doctrine that a person who is compos mentis can give away his property to any person he pleases; it would operate to render invalid all devises to persons not closely enough related to have an insurable interest
50 in the life of the testator. What reason can be given warranting the declaring of an insurance policy void when a friend, a stranger in blood, is made the beneficiary by the assured, that would not apply with the same force to a testator devising property to a person not having an insurable interest in the life of the testator? Yet such devises have been universally upheld. Is it possible that a beneficiary in an insurance policy, such as is alleged in the case at bar, would have a greater desire for the premature death of the assured and take steps to produce it, than a creditor would, especially Harris, who was only the surety of Embry in the case supra, and in which case the policy was upheld and declared not to be a wagering contract? In the case of Hill vs. United Life Ins. Association and N. W. Masonic Aid Association vs. Jones, 35 Am. St. Rep., 807 and 810, the Supreme Court of Pennsylvania said:

"A man may insure his own life, paying the premium himself, for the benefit of another, who has no insurable interest, and that such a transaction is not a wagering policy. This results from the right which a man has to dispose of his own property."

The following cases also sustain this principle, Prudential Ins. Co. vs. Hunn, 69 Am. St. Rep., 380, 21 Ind. App., 525, and Scott vs. Dickson, 56 Am. Rep., 192, 108 Penn. St., 6. In the last named case the identical question involved in this case was considered, and the court said:

51 "Policies of this nature are in no sense wagering. It would be denying a man's right to do what he will with his own to say that he could not in any form insure his life for the benefit of an indigent relative, or a friend to whom he felt under obligations. And the fact that he continues to pay the premium himself, and retains the control of the policy up to the time of his death, leaves no room for speculation or the improper practice which a

few years ago brought such a scandal upon the life insurance business in this State."

It is claimed that the case of Caudell vs. Woodward, supra, establishes a different principle. That case was decided upon the organic law of a fraternal order, but language is used in the opinion which, seemingly, sustains appellee's contention. However, the conclusion reached in the case at bar is also announced in that opinion, that is, one who obtains a policy of insurance on the life of another must have an insurable interest in the life of that other. The opinion in that case also announced the doctrine that one is prohibited from inducing another to take out insurance, or become the owner of such insurance by assignment, unless he has an insurable interest in the life of that other; and that Mrs. Woodward, a stranger, could not recover on the policy, because it is well settled that one obtaining a policy of insurance on the life of another, or who induced another to take out a policy for his benefit,
52 must have an insurable interest. All these propositions are fundamental and sound in law. There is nowhere, however, any reason given in the Caudell case why a person cannot take out insurance on his own life, pay the premiums and make a person who is not related to him the beneficiary; nor could there have been presented any reason against it that would not have applied with equal force to a gift of the same amount by will as well.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

Edwards, Ogden & Peak, for Appellant.

Henry Burnett, Beckley & Scott, for Appellee.

[Endorsed:] April 26, 1910. Rupp vs. Western Life Indemnity Co.

53 *Second Appeal.*

Be It Remembered, that here-fore, to-wit on the 21st day of June, 1911, the appellant, Western Life Indemnity Company, by its counsel filed in the office of the Clerk of the Court of Appeals a transcript of record in words and figures following, to-wit:

54 # 48871.

STATE OF KENTUCKY,
County of Jefferson:

Pleas Before the Honorable Thomas R. Gordon, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, at the Court-house, in the City of Louisville, County and State Aforesaid, and on the Dates Hereinafter Mentioned.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Transcript of Record.

Be It Remembered, That heretofore, to-wit on the 31st day of January, 1908 came plaintiff, by counsel and filed his petition herein. Said petition is in words and figures as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, —— Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Petition Ordinary.

55 The plaintiff, Clarence Rupp, states that the defendant, Western life Insurance Company, is a corporation created by law with power to sue and be sued, contract and be contracted with, and to do general life insurance business under and by its corporate name aforesaid.

The plaintiff states that on the — day of September, 1907, George McCormick applied to the defendant, Western Life Indemnity Company, for a policy of insurance on his life in the sum of One Thousand ($1,000) Dollars, and afterwards, to-wit; on the 20th day of September, 1907, the defendant accepted said application, and in consideration of $54.76 then paid to it by said George McCormick, which it then accepted, issued and delivered to said George McCormick an insurance policy numbered 23892 on the life of said George McCormick for One Thousand ($1,000) Dollars, by reason of which it undertook to and did insure the life of said George McCormick for the sum of One Thousand ($1,000) Dollars for a period of twelve months from said date, or until the 20th day of September, 1908, and by the terms of said contract or policy the same was to be continued upon an annual payment to it on the 20th day of September of each year during the continuance of said contract the said sum of $54.76; that by the direction and under the instruction of said George McCormick, the defendant issued said policy payable to this plaintiff, and this without the plaintiff's instance, request or knowl-

edge, should this plaintiff be living at the time of the death of said McCormick, otherwise to be paid to the insured's executor, administrator or assigns, said payment to be made upon satisfactory proof of death of the insured.

56 He states that afterwards, to-wit on the 18th day of October 1907, said McCormick departed this life, and afterwards due notice and proof his death was furnished the defendant; that it then denied all liability under said policy and refused payment thereof; that said liability was denied through and by a letter written to this plaintiff and signed by the President of the defendant on December 2, 1907, which is as follows:

CHICAGO, ILL., *Dec.* 12, 1907.

Mr. Clarence Rupp, 1468 High Street, Louisville, Ky.

DEAR SIR: Receipt is acknowledged of your favor of December 11, 1907. As Mr. L. H. Spence, Superintendent of our claim department, has already advised you, and for reasons already known to you, this company denies any and all liability under the policies to which you refer in your letter.

Faithfully yours,

GEO. M. MOULTON, *President.*

that said policies referred to in said letter are the two policies issued and filed herewith. Plaintiff here files said letter as part of said petition marked "Moulton."

The defendant has broken and violated the terms of its contract as herein set out, and refused payment under said policy by reason of which it is indebted to this plaintiff in the sum of One Thousand ($1,000) Dollars.

He says that George McCormick, the insured, was an uncle of this plaintiff, and he had no wife or children and was largely de-

57 pendent upon this plaintiff, that he lived in a house of this plaintiff, and at times did work for this plaintiff. He filed herewith as part hereof said policy marked Exhibit "A."

Paragraph # 2.

He states that on the 7th day of September, 1907, George McCormick applied to the defendant, Western Life Indemnity Company for a policy of insurance on his life in the sum of One Thousand ($1,000) Dollars, and afterwards, to-wit: on the — day of September, 1907, the defendant accepted said application, and in consideration of $54.76 then paid to it by said George McCormick, which it then accepted, issued and delivered to said George McCormick an insurance policy numbered — on the life of said George McCormick for One Thousand ($1,000) Dollars by reason of which it undertook to and did insure the life of said George McCormick for the sum of One Thousand Dollars ($1,000) for a period of twelve months from said date, or until the — day of September, 1908, and by the terms of said contract or policy the same was to be continued upon an annual payment to it on the — day of

September of each year during the continuance of said contract the said sum of $54.76; that by the direction and under the instruction of said George McCormick, the defendant issued said policy payable to this plaintiff, and this without this plaintiff's instance, request or knowledge, should this plaintiff be living at the time of the death of said George McCormick, otherwise to be paid to the insured's executor, administrator, or assigns; said payment to be made upon satisfactory proof of death of the insured.

He states that afterwards, to-wit: on the 18th day of October, 1907, said McCormick departed this life, and afterwards due notice and proof of his death was furnished the defendant; that it
58 then denied all liability under said policy and refused payment thereof; that said liability was denied through and by a letter written to this paintiff and signed by the president of the defendant on December 12, 1907, which is as follows:

CHICAGO, ILL., *Dec.* 12, 1907.

Mr. Clarence Rupp, 1468 High Street, Louisville, Ky.

DEAR SIR: Receipt is acknowledged of your favor of December 11, 1907. As Mr. L. H. Spence, Superintendent of our claim department, has already advised you, and for reasons already known to you, this company denies any and all liability under the policies to which your refer in your letter.

Faithfully yours,

GEO. S. MOULTON, *President.*

that said policies referred to in said letter are the two policies issued and filed herewith. Plaintiff files said letter as part of said petition marked "Moulton."

The defendant has broken and violated the terms of its contract as herein set out, and refused payment under said policy by reason of which it is indebted to this plaintiff in the sum of One Thousand ($1,000) Dollars.

He says that George McCormick, the insured, was an uncle of this plaintiff, and he has no wife or children and was largely dependent upon this plaintiff, that he lived in a house of this plaintiff, and at times did work for this plaintiff. He files herewith as part hereof said policy marked Exhibit "B".

59 Wherefore, he prays judgment against the defendant in the sum of $2,000.00, for his costs herein and all general and proper relief.

EDWARDS, OGDEN & PEAK,
Attorney- for Plaintiff.

Clarence Rupp, on oath, says that the foregoing statements are true.

CLARENCE RUPP.

Subscribed and sworn to before me this 27 day of January, 1908. My commission expires Jan. 11, 1910.

JAS. P. EDWARDS,
N. P., Jeff. Co., Ky.

Exhibits referred to in foregoing petition and filed in Court March 21st, 1908, are missing from the record and cannot be copied herein.

(See pages 80-93 of this transcript.)

60 And thereupon on the 31st day of January, 1908, the Clerk issued summons and copy, which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the Sheriff of Jefferson County, Greeting:

We command you to summon Western Life Indemnity Company to answer a petition filed against it in our Jefferson Circuit Court, by Clarence Rupp and warn it that upon failure to answer within twenty days after service hereof, if in Jefferson County, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option, and make due return of this summons within sixty days from the date hereof.

Witness, W. L. Weller, Jr., Clerk of said Court this 31 day of January, 1908.

W. L. WELLER, JR., *Clerk*.
By R. KALTENBACHER, *D. C.*

Sheriff's return on foregoing summons is as follows:
Came to hand Jan. 31, 1908, at 3:25 P. M.
The within named not found.

CHAS. S. SCHOLL, *S. J. C.*
By JNO. W. ULLRICH, *D. S.*

And thereupon on the 19th day of February, 1908 the Clerk issued summons and copy to Franklin County, which said summons is as follows:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the Sheriff of Franklin County, Greeting:

We command you to summon Western Life Indemnity
61 Company, to answer a petition filed against it in our Jefferson Circuit Court, by Clarence Rupp and warn it that upon failure to answer within twenty days after service hereof, if in Jefferson County, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option and make due return of this summons within sixty days from the date hereof.

Witness, W. L. Weller, Jr., Clerk of said Court this 19th day of February, 1908.

W. L. WELLER, JR., *Clerk*,
By R. KALTENBACKER, *D. C.*

Sheriff's return on foregoing summons is as follows:
Executed the within summons on the Western Life Indemnity Co. by delivering a true copy thereof to C. W. Bell, Insurance Commissioner for the State of Ky.
This Feb. 21, 1908.

R. C. HIATT, *S. F. C.*

At a Court Held on the 1st Day of April, 1908.

Came the defendant the Western Life Indemnity Company of Illinois, with leave of Court for the purpose of making
62 this motion for this purpose alone hereby enters its appearance and in writing filed moves the Court to quash the return on the summons herein, to which the plaintiff objects.
Said motion filed on the 1st day of April, 1908, is as follows:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY CO., Defendant.

Motion.

The defendant, the Western Life Indemnity Co., of Illinois, with leave of Court for the purpose of making this motion and for this purpose alone, hereby enters its special appearance and moves the Court to quash the return on the summons herein.

BECKLEY & SCOTT,
Attorneys for Western Life Indemnity Company.

And on the 4th day of April, 1908, the following affidavit of Pendleton Beckley, was filed in court:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY CO., Defendant.

Affidavit of Pendleton Beckley.

63 Affiant, Pendleton Beckley, states that he is a member of the firm of Beckley & Scott, practicing attorneys at the Louisville Bar; that said firm has transacted certain business at the instance and request of one Thomas J. Graydon, an attorney of Chicago, Ill., and affiant is informed that said Thomas J. Graydon is the attorney for the Western Life Indemnity Co., of Illinois, defendant in this case. Affiant states that said Western Life Indemnity Co., is a corporation organized and existing under the laws

of the State of Illinois; that said Western Life Indemnity Co., as affiant is informed and believes at or about the time the policies herein sued on were issued by said Western Life Indemnity Co., said Western Life Indemnity Co., had applied to the Superintendent of Insurance of the State of Kentucky for a license to transact its business in accordance with the laws of this State and in case such license was issued to appoint said Superintendent of Insurance its agent for service of process in the State of Kentucky, that said application for a license was pending for some time and that it was during the time the defendant company was so in good faith intending and attempting to comply with the law of this State and to be duly licensed in the State of Kentucky, that the making of said contracts or policies herein sued on were entered upon. Affiant further states that a license to do business in the State of Kentucky was not issued to said Company by the Insurance Commissioner of said State; that said defendant company did not file with the Commissioner a resolution adopted by its Board of Directors consenting that service of process be made upon any agent of such company in this State or upon the Commissioner of Insurance of this State, or that said service should be a valid service upon said Com-
64 pany.

PENDLETON BECKLEY.

Subscribed and sworn to before me by Pendleton Beckley this 3rd day of April, 1908. My commission expires the 29th day of of January, 1912.

MINNIE SCHENKEL.
Notary Public, Jefferson County, Ky.

And thereupon on the 7th day of April, 1908, the following affidavit of George M. Moulton was filed in Court:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Affidavit of George M. Moulton.

Affiant, George M. Moulton, states that he is the President of the Western Life Indemnity Company, of Chicago, Illinois, and resides at said City of Chicago; that he has knowledge of the matters and things herein stated and makes this affidavit for and in behalf of said Company; that said Western Life Indemnity Company is a corporation organized and doing business under an Act of the Legislature of the State of Illinois providing for the incorporation of companies to do the business of Life and Accident Insurance on the assessment plan.

65 Affiant further states that said Western Life Indemnity Company before the making of the contract of insurance

herein sued upon had expected and desired to be admitted to transact business in the State of Kentucky according to the laws thereof; that its application for such license to do business was rejected by the Insurance Department of said State of Kentucky; that said Western Life Indemnity Company never appointed said Superintendent of Insurance its agent for services of process in said State of Kentucky and never consented that said Superintendent of Insurance might be served with or accept such service on said Company's behalf; and that said Superintendent of Insurance of the State of Kentucky has not now and never has had authority for or on behalf of said Western Life Indemnity Company to be served with or to accept process of service in the State of Kentucky.

Affiant further states that at the time said Company first took up the matter of procuring business in said State of Kentucky and thereafter it in good faith expected that a license to engage in business in said State of Kentucky would be issued to it; that the application above referred to, to the Insurance Department of said State of Kentucky was made in pursuance of such intention; and that had not said Company so expected to be licensed according to the Law to transact business in said State of Kentucky, said Company never would have considered the taking of any insurance business on its behalf from said State of Kentucky.

Affiant further states that said Company or its officers had no knowledge of the pendency of said above entitled action until Monday, March 30th, 1908, when affiant was shown a letter written by Messrs. Beckley and Scott, attorneys of Louisville, Ken-
66 tucky, which letter was addressed to Thomas J. Graydon, an attorney of Chicago, who has represented said defendant Company in certain matters; that said letter from Beckley and Scott, stated that said action had accidentally come to the notice of said Beckley and Scott and that it was claimed that service therein had been had on the Insurance Commissioner of the State of Kentucky for and on behalf of defendant; that up to said 30th day of March, 1908, defendant had had absolutely no knowledge that such action had been begun and has had no notice of said action since said 30th day of March or at any other time from any person whomsoever except said Beckley and Scott, Attorneys as above stated and from said Thomas Graydon.

GEORGE M. MOULTON.

STATE OF ILLINOIS,
County of Cook, ss:

Subscribed and sworn to before me by George M. Moulton this 4th day of April, 1908. My commission expires on the 17 day of Dec. 1908.

[SEAL.]

W. N. BISHOP,
Notary Public Cook County, Illinois.

At a Court Held on the 16th Day of May, 1908.

The Court being sufficiently advised it is considered and adjudged that the motion of the defendant to quash the return on the summons herein be and is overruled; To which the defendant excepts.

And thereupon on the 21st day of March, 1911 the following Second Amended Answer was filed in Court:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

67 *Second Amended Answer.*

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY COMPANY, Defendant.

Paragraph 1. The defendant, Western Life Indemnity Company, without waiving its plea to the jurisdiction of this Court of the person of this defendant in this action, further answering paragraph 1 and paragraph 2 of the petition herein, states that the said defendant, Western Life Indemnity Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois with power to sue and be sued, contract and contracted with and to issue policies of insurance upon the lives of certain individuals; that said company was duly organized and incorporated under an Act of the Legislature of the State of Illinois, approved June 22, 1893, and entitled, "An Act to incorporate companies to do the business of life or accident insurance on the assessment plan, and to control such companies of this State and of other States doing business in this State, and to repeal a certain act therein named and providing and fixing the punishment for violation of the provisions thereof." Defendant states that after its organization under and by virtue of said Act it began the business of insuring the lives of certain individuals; that it has exercised the powers and authority granted by virtue of its incorporation under said act and that it still exercises and enjoys the privileges and powers thereunder. Defendant states that Section 9 of said Act, to-wit: An Act to incorporate companies to do the business of life or acci-
68 dent insurance on the assessment plan and to control such companies of this State and of other States doing business in this State, and to repeal a certain act therein named and providing and fixing the punishment for violations of the provisions thereof approved June 22, 1893, in force July 1, 1893, is as follows, to-wit:

"SEC. 9. No corporation doing business of life insurance under this act shall issue a certificate or policy upon the life of any person more than sixty-five years of age, excepting in case of transfer of policy holders as provided herein, nor upon a life in which the beneficiary named has no insurable interest. Any assignment of

the policy or certificate to a person having no insurable interest in the insured life shall render such a policy or certificate void."

Defendant states that under said act and under Section 9 of said Act as aforesaid, said defendant Company has no power to issue any policy or policies of insurance upon the life of any person in which the beneficiary named had no insurable interest.

Defendant further states that the said plaintiff, Clarence Rupp was the nephew of the insured George McCormick; that the said Clarence Rupp had no insurable interest by virtue of said relationship or otherwise in the life of the said insured, George McCormick, and that said policies herein sued on are null and void.

The defendant, Western Life Indemnity Company hereby makes profert to the personal representative of the estate of George McCormick, deceased, the sum of $54.76, being the full amount
69 of the premium paid or which should have been paid to the said defendant Company on policy No. 23892 on the life of said George McCormick for $1,000.00 in the said defendant Company, and the defendant Company further answering tenders said amount in Court in payment of all claims and liabilities to the said heirs, representatives, and beneficiaries of the said George McCormick, deceased, by reason of and growing out of any agreement made by and between the said George McCormick and the said defendant, Webster Life Indemnity Company, by virtue of the issurance of said policy, or otherwise.

The defendant, Western Life Indemnity Company, hereby makes profert to the personal representative of the estate of George McCormick, deceased, the sum of $54.76, being the full amount of the premium paid or which should have been paid to the said defendant company on policy No. 23870 on the life of said George McCormick for $1,000.00 in the said defendant Company, and the defendant Company further answering tenders said amount in Court in payment of all claims, and liabilities to the said heirs, representatives, and beneficiaries of the said George McCormick, deceased, by reason of and growing out of any agreement made by and between the said George McCormick, and the said defendant, Western Life Indemnity Company, by virtue of the issuance of said policy, or otherwise.

Paragraph 2. The defendant, Western Life Indemnity Company, further answering paragraph- one and two of the petition herein, says that the said plaintiff Clarence Rupp did not have at the time
70 said policies mentioned therein were issued by the said defendant Company to the said George McCormick, an insurable interest in the life of the said George McCormick, that said policies by reason thereof are null and void.

The defendant Western Life Indemnity Company hereby offers to return to the personal representatives of the estate of George McCormick, deceased, the sum of $54.76, being the full amount of the premium paid or which should have been paid to the said defendant Company on policy No. 23892 on the life of said GeGorge McCormick for $1,000.00 in the said defendant Company, and the defendant Company further answering tenders said amount in

Court in payment of all claims, and liabilities to the said heirs, representatives, and beneficiaries of the said George McCormick, deceased, by reason of and growing out of any agreements made by and between the said George McCormick and the said defendant, Western Life Indemnity Company by virtue of the issuance of said policy, or otherwise.

The defendant Western Life Indemnity Company, hereby offers to return to the personal representatives of the estate of George McCormick, deceased, the sum of $54.76, being the full amount of the premium paid or which should rave been paid to the said defendant company on policy No. 23870 on the life of said George McCormick for $1,000.00 in the said defendant Company and the defendant Company further answering tenders said amount in Court in payment of all claims and liabilities to the said heirs, representatives, and beneficiaries of the said George McCormick, deceased, by reason of and growing out of any agreements made by and between the said George McCormick and the said defendant, Western Life Indemnity Company by virtue of the issuance of said policy. *issuance of said policy.*

71 Paragraph 3. The defendant, Western Life Indemnity Company, for further answer to the petition herein, states that it is a corporation organized and existing under the laws of the State of Illinois, with power to sue and be sued, contract and be contracted with, and to issue policies of insurance upon the lives of certain individuals. That said Company was duly organized and incorporated under an Act of the Legislature of the State of Illinois, approved June 22, 1893, and entitled "An Act to incorporate companies to do the business of life or accident insurance on the assessment plan and control such companies of this State and of other states doing business in this State, and to repeal a certain Act therein named and providing and fixing punishment for violation of the provisions thereof."

Defendant states that since its organization under and by virtue of said Act, it has issued many policies of insurance upon the lives of certain individuals as provided in said Charter of said defendant Company, that each of said persons so insured has a vested right in the reserve fund owned by said Company or reserved by it for the payment of policies issued by said Company.

Defendant states that said policy holders are residents of the State of Illinois and of other States throughout the United States.

Defendant further states that Section 9 of said Act of said Illinois Legislature, mentioned above, which was duly approved June 22, 1893 and in force July 1, 1893, and under which said defend-

72 ant, Western Life Indemnity Co. was organized and which was and is a part of the organic law under which said organization is — as follows:

SEC. 9. No corporation doing business of life insurance under this act shall issue a certificate or policy upon the life of any person more than sixty-five years of age, excepting in case of transfer of policy holders as provided herein, nor upon a life in which the beneficiary named has no insurable interest. Any assignment of the policy or

certificate to a person having no insurable interest in the insured life shall render such a policy or certificate void."

Defendant states that under said Act and under Section 9 of said Act as aforesaid, said defendant Company had no power to issue any policy or policies of insurance upon the life of any person in which the beneficiary named had no insurable interest.

Defendant further states that the said plaintiff, Clarence Rupp, was the nephew of the insured, George McCormick, and that the said Clarence Rupp had no insurable interest by virtue of said relationship or otherwise in the life of the said insured, George McCormick, and that said policies herein sued on are null and void, and defendant Company hereby pleads and relied upon said — State of Illinois, set forth above, as a bar to the recovery by plaintiff of any sum under the policies herein sued on.

Defendant states that Section 1, of Article 4, of the Con-
73 stitution of the United States provides:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof".

Defendant, Western Life Indemnity Company, states that to compel said defendant to pay said policies of insurance herein sued on would be in violation of the law of the State of Illinois, set forth above, creating said defendant Company and would be a failure upon the part of the State of Kentucky to give full faith and credit to the Act of the Legislature of the State of Illinois under which said defendant was created and under which said defendant existed at the time said policies sued on were issued or attempted to be issued and under which said company still exists.

Defendant further states that each and every policy holder in said defendant Company has a vested interest in the fund of said Company set apart under the said Act creating the said Company for the payment of policies issued by said Company under and by virtue of its Charter as aforesaid.

Defendant further states that the payment of any sum or sums under said policies sued on would be in violation of the rights of said policy holders as aforesaid and would take from them their property without the due process of law guaranteed unto them by the Constitution of the United States.

74 Defendant, Western Life Indemnity Company, with leave of Court withdraws each and every allegation of the original answer and the first amended answer herein.

Wherefore, having fully answered, defendant Western Life Indemnity Company, prays to be dismissed hence with its costs.

BECKLEY & SCOTT,
HENRY BURNETT,
Attorney- for Defendant.

And thereupon on the 21st day of March, 1911 the following demurrer was filed in Court:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY Co., Defendant.

Demurrer.

Comes plaintiff, by Att'y and demurs generally to the answer as amended because same does not state facts sufficient to support a defense herein.

EDWARDS, OGDEN & PEAK,
Att'ys for Pl'ff.

At a Court Held on the 21st Day of March, 1911.

75 Came the defendant, by counsel and filed its second amended answer herein; then came the plaintiff, by counsel and filed a demurrer to the said answer as amended and the Court being advised on said demurrer, sustains same with leave to the defendant to amend, to which the defendant excepts, and the defendant declining to further amend the said amended answer is dismissed; to which the defendant objects and excepts, then the defendant by counsel withdrew all of its original first amended answer filed herewith, and elects to rely only upon the second amended answer this day filed, to which a demurrer was this day sustained and this cause being submitted for judgment it is now adjudged by the Court that the plaintiff Clarence Rupp recover of the defendant Western Life Indemnity Company the sum of $1,000.00 with interest thereon at the rate of six per cent per annum from the 31st day of Jan'y 1908 until paid and the further sum of $1,000.00 with interest at the rate of six per cent per annum from the 31st day of January, 1908 until paid and his costs in this behalf expended, to all of which defendant objects and excepts and prays an appeal to the Court of Appeals, which is granted.

And thereupon on the 11th day of May, 1911 the following Schedule was filed in the Clerk's Office:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

CLARENCE RUPP, Plaintiff,
vs.
WESTERN LIFE INDEMNITY Co., Defendant.

Schedule.

76 For the purpose of an appeal to the Court of Appeals of Kentucky, the Clerk of the Jefferson Circuit Court is directed to copy the following portions of the record in the above styled case.

The petition filed January 31, 1908 and Exhibits filed therewith.

Copy of Summons with the return of the Sheriff thereon.

The entry of special appearance and motion of defendant to quash return on the summons of April 1, 1908.

The affi*ant* of Pendleton Beckley filed April 4, 1908.

The affidavit of George M. Moulton filed April 7, 1908.

Order overruling motion to quash return on summons, May 16th, 1908.

The Second Amended Answer filed March 21, 1911.

The demurrer to the Second Amended Answer filed March 21, 1911.

The judgment entered March 21, 1911.

The Order granting defendant an appeal to the Court of Appeals of March 21, 1911.

And said plaintiff hereby waives and accepts notice of the filing of this Schedule by said defendant.

EDWARDS, OGDEN & PEAK,
Attorneys for Plaintiff.
BECKLEY & SCOTT,
HENRY BURNETT,
Attorneys for Defendant.

77 STATE OF KENTUCKY,
County of Jefferson:

I, Louis Summers, Clerk of the Jefferson Circuit Court do hereby certify that the foregoing Twenty-two (22) pages, contain a full true and complete transcript of the record and proceedings (with exceptions of Exhibits referred to in petition and filed on the 21st day of March, 1908, which said Exhibits are missing from the papers in this case) as per schedule filed in the action wherein Clarence Rupp, is plaintiff and Western Life Indemnity Company, is defendant, #48871, as the same appears of record and now on file in my said office.

Witness, Louis Summers, Clerk of said Court this 22 day of May, 1911.

LOUIS SUMMERS,
Clerk Jefferson Circuit Court.

78 With the above transcript there was filed by the appellant through its counsel, a statement of parties and of the appeal which is in words and figures following, to-wit:

WESTERN LIFE INDEMNITY COMPANY, Appellant,
vs.
CLARENCE RUPP, Appellee.

Statement.

The names of the parties to this appeal are as stated in the caption hereof.

The judgment appealed from was rendered by the Jefferson Circuit Court, Common Pleas Branch, Second Division on the 21st

day of March, 1911, and may be found at the bottom of page 20 of the record.

The appeal was granted by the Court below and no summons or warning order is desired.

The names and addresses of appellee's attorneys are as follows: Edwards, Ogden & Peak, Kentucky Title Building, Louisville, Ky.

The names and addresses of appellant's attorneys are as follows: Beckley & Scott, Louisville Trust Building, Louisville, Ky. Henry Burnett, Paul Jones Building, Louisville, Ky.

BECKLEY & SCOTT,
HENRY BURNETT,
Attorneys for Appellant.

79 Afterward at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in Frankfort, on the 26th, day of September, 1911, the following order was entered to-wit:—

WESTERN LIFE INDEMNITY COMPANY
vs.
RUPP.

Jefferson.

Came parties by counsel and filed agreement, and upon motion appellant is given sixty days extension and appellee twenty days thereafter to file brief.

Afterward at a Court of Appeals held as aforesaid, on the 8th day of December, 1911, the following order was entered, to-wit:—

WESTERN LIFE INDEMNITY COMPANY
vs.
RUPP.

Jefferson.

Came parties by counsel and filed agreement, and on motion the original policies on file in former appeal are permitted to be withdrawn and filed and made a part of the record herein.

The agreement filed by the foregoing order is as follows:—

Court of Appeals.

No. 47781.

WESTERN INDEMNITY LIFE INSURANCE CO., Appellant,
vs.
CLARENCE RUPP, Appellee.

Agreement.

The record in this case failing to contain either the original or a copy of the two policies of insurance sued on, it is now agreed be-

tween the parties hereto that the clerk of the Court of Ap-
80 peals shall take from the record in the case of Clarence Rupp against the Western Indemnity Life Insurance Co. heretofore pending in the Court of Appeals (The opinion in which is reported in 138 Ky. Page 18) the original or copy of the two policies therein and file the same in this cause, it being agreed by the parties that the original or copies of said two policies in said action are the policies sued on in this action. And said two policies when filed by the clerk are to have the same force and effect as if the original was filed and are to substitute a part of the record in this action.

BECKLEY & SCOTT,
HENRY BURNETT,
Att'ys for Appellant.

The Exhibits referred to in the foregoing agreement are in words and figures following, to-wit:—

Western Life Indemnity Company, Chicago.

Number 23870.

Hereby insures the life of George McCormick of Louisville State of Kentucky and agrees to pay One Thousand Dollars to his Nephew Clarence Rupp—if living otherwise to the Insured's executors, administrators or assigns, in the manner herein provided, at the Home Office of this Company, in the City of Chicago, Illinois, within thirty days from the receipt of satisfactory proof of the death of the Insured.

This contract for insurance is made in consideration of the application therefor, which is hereby made a part of this contract and a copy thereof hereto attached; and in further
81 consideration of the sum of Fifty-four Dollars and Seventy-six Cents, in annual installments, as agreed between the parties hereto and according to the rates specified in the margin hereof, being the premium for term insurance for the period terminating on the Seventh day of September, 1908 and in further consideration of the payment on said last named date, to this Company at its Home Office in the City of Chicago, as the premium for whole life insurance of the sum of Fifty-four Dollars and Seventy-six Cents, and a like sum annually thereafter, on or before the Seventh day of September in every year during the continuance of this contract.

Amount $1,000.

Age 58.

This policy is issued and accepted subject to the benefits, stipulations and conditions, as set forth on the following pages which form

a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

Premium.
Annual $54.76
Semi-An. $——.
Quar. $——.
Monthly $——.

In witness whereof the Western Life Indemnity Company has caused this policy to be signed by the President and Secretary at its office in the City of Chicago, State of Illinois, this Seventh day of September, 1907.

GEO. M. MOULTON, *President.*
A. N. HISLOP, *Secretary.*

Countersigned:

O. R. BEANBIEN,
For the Company.

Examined by
M. E. S.

82 *Benefits, Stipulations and Conditions.*

First. This policy shall not take effect until the first premium shall have been actually paid during the life-time and sound health of the insured.

Second. After one year from its date, this policy shall be incontestable, except for non-payment of premiums, as herein provided, and subject to the conditions herein contained as to age, and as to military and naval service in time of war.

Third. The Company will admit the age of the insured at any time on satisfactory proof, but if not so admitted and if the age is shown to have been understated, the amount of insurance payable hereunder shall be such an amount as the premiums actually paid would have purchased at the true age according to this Company's table of rates.

Fourth. The liability of the Company on this policy shall be limited to the amount of premiums paid thereon if at any time the insured shall, without the Company's written permission, engage in military or naval service in time of war.

Fifth. One month's grace will be allowed in the payment of all premiums after the first year, provided payment is made to this Company during the life-time of the insured.

Sixth. Notice of each and every payment due or to become due hereon is given and accepted by the delivery and acceptance of this policy, and any further notice which may be required by any statute is hereby expressly waived. In case this policy is lapsed for non-payment of premium, it may be reinstated within three months thereafter upon evidence of insurability satisfactory to the Company, and upon payment of all premiums then due and unpaid with interest thereon at five per cent per annum.

83 Seventh. The Company assumes no responsibility for the validity of any assignment, and shall not be held to have notice of any assignment of this policy unless such assignment be in writing, and until the original assignment or a duplicate or a certi-

fied copy thereof is filed in the Company's home office and its receipt duly acknowledged. Any claim under any assignment shall be subject to proof of interest.

Eighth. Subject to the rights of any assignee, and subject to the rules of the Company, the insured may at any time, and from time to time during the continuance of this policy, change the beneficiary by filing at the home office of the Company a written request for such change, accompanied by this policy. Such change shall take effect only when endorsed upon this policy by the Company, whereupon all rights of the former beneficiary or beneficiaries shall cease.

Ninth. No person except the President, a Vice-President or the Secretary has the power, on behalf of the Company, to make or modify this contract, to extend the time for payment of premiums, or to waive any forfeiture, or to bind the Company by making any promise or by accepting any representations or information not contained in the application for this policy. These powers will not be delegated, and can be exercised by said officers only in writing.

Tenth. Proofs of death under this policy shall be furnished to this Company at its home office in Chicago, Illinois, upon the Company's blank forms, not later than six months after the death of the insured. No suit shall be brought against the Company on this policy after one year from the time when the cause of action shall have arisen; or after one year from the date of the death of the insured.

84 Eleventh. Notice is hereby given and accepted that the insured hereunder, while this policy remains in force, is a member of the Western Life Indemnity Company, and that at all meetings of the Company he is entitled to one vote for each Five Hundred Dollars of this insurance, and that the annual meeings of the Company are held at its home office in the City of Chicago, State of Illinois, on the second Tuesday of January in each year at ten o'clock A. M.

Twelfth. The premiums paid hereon to the first anniversary of the date of this policy are the consideration for term insurance to such anniversary, and for its continuance after such anniversary as a whole life policy by the payment of subsequent premiums as hereinbefore required.

Thirteenth. Should the premium be insufficient to meet the requirements of this policy, the Company reserves the right, in compliance with the law of its incorporation, to call for the difference necessary to meet such requirements and to fix the time for payment thereof.

Fourteenth. All premiums are due and payable at the Company's home office in Chicago, Illinois, or to this Company's authorized agents in exchange for receipts signed by the President, a Vice-President or the Secretary, and countersigned by the agents respectively designated therein. Premiums are payable annually in advance, but may be paid in semi-annual, quarterly or monthly installments in advance at the Company's table rates. Any unpaid part of the current policy year's premium will be deducted in any settlement of this policy. If any premium or any semi-annual, quarterly or

monthly installment, or any note therefor, or any indebtedness secured by this policy shall not be paid when due, this policy shall thereupon cease and determine. The words "premium" or "premiums" used in this contract shall be deemed to mean and include any calls or assessments which shall be made thereon.

85 Form 63. Copy. Part 1. No. 781.

Application to the Western Life Indemnity Co., Masonic Temple, Chicago.

Name in Full.

1. Application of George McCormick For Life Insurance,

Street, City or Town, County, State.

Residence 1462 High Ave. Jefferson Ky. P. O., Address Louisville, Ky.

2. Occupation or Employment and location of same Stable boss Jefferson Ky. If more than one state all.

3. Former Occupation and Residence City works repairs

4. Place and date of your Birth? Ky. 25 Nov. 1849

City or Town County single State day month Year

5. My age at my nearest birthday is therefore 58 years. Are you married or single?

6. Full name of the person for whose benefit the insurance is desired

Clarence Rupp Relationship to yourself Nephew

7. Have you ever applied for insurance in this Company? No If so, what is the number and amount of each policy issued?

8. Is your life now insured in any other company?

If so, in what companies and for what amount? No

9. Have you ever applied to any company or association for insurance, without receiving a policy of the exact kind and amount applied for? No

10. Is any negotiation for other insurance now pending or contemplated? No.

11. Policy– Amount, $1000.00 Kind W. L. non part with a- annual premium of $54.76.

Insert form of policy applied for. Insert An'l, Semi-An-, Quar. or Mo.

12. Have you paid the agent making this application the premium on the same? no Will pay on delivery

This application, Made to the Western Life Indemnity Company of Chicago is the basis and a part of a proposed Contract for Insurance, subject to the charter of the Company and the laws of the State of Illinois. I hereby agree that all the foregoing statements and answers, and all those that I make to the Company's Medical Examiner in Part Two of this application are by me war-
86 ranted to be true, and are offered to the Company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect until the first premium shall have

been paid, during my continuance in sound health, and the policy shall have been executed and issued by the Company. I further agree that in any distribution of surplus the principle and methods which may then be in use by the Company for such distribution, and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in the contract.

I hereby warrant and agree that during one year following the date of issue of the Contract of Insurance for which application is hereby made, that the liability of the Company shall be limited to the amount of Premiums paid on this policy should I engage in any of the following extra hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of hi-ly explosive substances service upon any railroad freight train or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the Company; that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue.

I further agree to accept and abide by the by-laws, rules and regulations of the Company, as they now are or may be lawfully changed hereafter.

Dated at Louisville Sept. 1, 1907.

—— ——, *Agent.*

Signature of person or persons soliciting and securing application.

—— ——, *Manager.*

his
GEORGE X McCORMICK.
mark

Signature of person who- life is proposed for insurance.

No other form of Receipt for advance payment of Premium will be recognized by the Company.

87 If the premium is paid in advance this receipt must be completed and given to the applicant; if the premium is not paid the receipt must not be detached.

An application for a — Policy having been made by —— —— to The Western Life Indemnity Company, Masonic Temple, Chicago, Ill., there has been collected from him — Dollars to be considered the first — premium on said Annual, Semi-annual, Quarterly or Monthly Policy, provided the application is approved by the Company, at its Home Office. If the application is not so approved the sum collected will be returned.

—— ——, *Agent.*

Form 50. 3M-6-07. No. 801.

Western Life Indemnity Company,

Masonic Temple, Chicago, Ill.

Received, the First Annual Premium of $54.76 on Policy No. 23870 for $1,000, due Sept. 7, 1907, on the life of George McCormick, 1462 High Ave., Louisville, Ky.

This receipt to be valid must be signed by the President or Secretary and countersigned by the authorized collector.

Countersigned this 20 day of Sept., 190–.

GEO. M. MOULTON, *President.*

—— ——, *Collector.*

88 #48871. Exhibit "B." No. 23870. Western Life Indemnity Company. Chicago. Whole Life Policy. Issued to George McCormick, Louisville, Kentucky. Amount $1,000.00. Date—September 7, 1907.

48871. Exhibit "B." Jefferson Circuit Court. Common Pleas Branch, Second Division. Clarence Rupp. Exhibit B. Western Life Ind. Co.

CHICAGO, ILL., —— —, —.

Received of Western Life Indemnity Company — Dollars in full for all claims under this Policy No. — now terminated by —.

—— ——.

In presence of

—— ——.

Filed Dec. 8, 1911. NAPIER ADAMS, *C. C. A.*

89 Western Life Indemnity Company.

CHICAGO, —— —, —.

Hereby insures the life of George McCormick of Louisville State of Kentucky and agrees to pay One Thousand Dollars to his Nephew, Clarence Rupp, if living, otherwise to the Insured's executors, administrators or assigns, in the manner herein provided, at the Home Office of this Company, in the City of Chicago, Illinois, within thirty days from the receipt of satisfactory proof of the death of the Insured.

Number 23892.

This contract for insurance is made in consideration of the application therefor, which is hereby made a part of this contract and a copy thereof hereto attached; and in further consideration of the sum of Fifty-four Dollars and Seventy-six Cents, in annual installments, as agreed between the parties hereto and according to the rates specified in the margin hereof, being the premium for term insurance for the period terminating on the Twentieth day of September, 1908 and

Amount $1,000.

in further consideration of the payment on said last named date, to this Company at its Home Office in the City of Chicago, as the premium for whole life insurance of the sum of Fifty-four
Age dollars and Seventy-six Cents, and a like sum annually
58. thereafter, on or before the Twentieth day of September in every year during the continuance of this contract.

This policy is issued and accepted subject to the benefits, stipulations and conditions, as set forth on the following pages which form a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

Premium.	
Annual.....	$54.76
Semi-An....	$——
Quar.....	$——
Monthly	$——

In witness whereof the Western Life Indemnity Company has caused this policy to be signed by the President and Secretary at its office in the City of Chicago, State of Illinois, this Twentieth day of September, 1907.

90

A. N. HISLOP, *Secretary.*
GEO. M. MOULTON, *President.*

Examined by
M. A. G.

Countersigned
M. E. SMITH,
For the Company.

Benefits, Stipulations, and Condition-.

First. This policy shall not take effect until the first premium shall have been actually paid during the life-time and sound health of the insured.

Second. After one year from its date, this policy shall be incontestable, except for non-payment of premiums, as herein provided, and subject to the conditions herein contained as to age, and as to military and naval service in time of war.

Third. The Company will admit the age of the in-ured at any time on satisfactory proof, but if not so admitted and if the age is shown to have been understated, the amount of insurance payable hereunder shall be such an amount as the premiums actually paid would have purchased at the true age according to this Company's table of rates.

Fourth. The liability of the Company on this policy shall be limited to the amount of premiums paid thereon if at any time the insured shall, without the Company's written permission, engage in military or naval service in time of war.

Fifth. One month's grace will be allowed in the payment of all premiums after the first year, provided payment is made to this Company during the life-time of the insured.

91 Sixth. Notice of each and every payment due or to become due hereon is given and accepted by the delivery and acceptance of this policy, and any further notice which may be re-

quired by any statute is hereby expressly waived. In case this policy is lapsed for non-payment of premium, it may be reinstated within three months thereafter upon evidence of insurability satisfactory to the Company, and upon payment of all premiums then due and unpaid with interest thereon at five per cent per annum.

Seventh. The Company assumes no responsibility for the validity of any assignment, and shall not be held to have notice of any assignment of this policy unless such assignment be in writing, and until the original assignment or a deplicate or a certified copy thereof is filed in the Company's home office and its receipt duly acknowledged. Any claim under any assignment shall be subject to proof of interest.

Eighth. Subject to the rights of any assignee, and subject to the rules of the Company, the insured may at any time, and from time to time during the continuance of this policy, change the beneficiary by filing at the home office of the Company a written request for such change, accompanied by this policy. Such change shall take effect only when endorsed upon this policy by the Company, whereupon all rights of the former beneficiary or beneficiaries shall cease.

Ninth. No person except the President, a Vice-President or the Secretary has the power, on behalf of the Company to make or modify this contract, to extend the time for payment of premiums, or to waive any forfeiture, or to bind the Company by making any promise or by accepting any representations or information not contained in the application for this policy. These powers will not be delegated, and can be exercised by said officers only in writing.

Tenth. Proofs of death under this policy shall be furnished to this Company at its home office in Chicago, Illinois, upon the Company's blank forms, nor later than six months after the
92 death of the insured. No suit shall be brought against the Company on this policy after one year from the time when the cause of action shall have arisen, or after one year from the date of the death of the insured.

Eleventh. Notice is hereby given and accepted that the insured hereunder, while this policy remains in force, is a member of the Western Life Indemnity Company, and that at all meetings of the Company he is entitled to one vote for each Five Hundred Dollars of this insurance, and that the annual meetings of the Company are held at its home office in the City of Chicago, State of Illinois, on the second Tuesday of January in each year at ten o'clock A. M.

Twelfth. The premiums paid hereon to the first anniversary of the date of this policy are the consideration for term insurance of such anniversary, and for its continuance after such anniversary as a whole life policy by the payment of subsequent premiums as hereinbefore required.

Thirteenth. Should the premium be insufficient to meet the requirements of this policy, the Company reserves the right, in compliance with the law of its incorporation, to call for the difference necessary to meet such requirements and to fix the time for payment thereof.

Fourteenth. All premiums are due and payable at the Company's

home office in Chicago, Illinois, or to this Company's authorized agents in exchange for receipts signed by the President, a Vice-President or the Secretary, and countersigned by the agents respectively designated therein. Premiums are payable annually in advance, but may be paid in semi-annual, quarterly or monthly installments in advance at the Company's table rates. Any unpaid part of the current policy year's premium will be deducted in any settlement of this policy. If any premium or any semi-
93 annual, quarterly or monthly installments, or any note therefor, or any indebtedness secured by this policy shall not be paid when due, this policy shall thereupon cease and determine. The words "premium" or "Premiums" used in this contract shall be deemed to mean and include any calls or assessments which shall be made hereon.

Form 63.

Copy. Part 1. No. 781.

Application to the Western Life Indemnity Co., Masonic Temple, Chicago.

Name in Full.

1. Application of George McCormick for life insurance. Resi-
Street. City, or Town, County, State.
dence, 1462 High Ave., Jefferson, Ky. P. O. Address, Louisville, Ky.

2. Occupation or Employment and location of same; Stable boss, Jefferson, Ky. If more than one, state all.

3. Former Occupation and Residence: City works repairs.

4. Place and date of your Birth? Ky. 25 Nov., 1849. City or Town, ——. County, ——. Single. State day, month, year. ——.

5. My age at my nearest birthday is therefore 58 years. Are you married or single? ——.

6. Full Name of the person for whose benefit the insurance is desired: Clarence Rupp. Relationship to yourself: Nephew.

7. Have you ever applied for insurance in this Company? No. If so, what is the number and amount of each policy issued?

8. Is your life now insured in any other company? If so, in what companies and for what amount? Yes. #23870 for $1,000.00.

9. Have you ever applied to any company or association for in-
surance, without receiving a policy of the exact kind and
94 amount applied for? No.

10. Is any negotiation for other insurance now pending or contemplated? No.

11. Policy—Amount, $1,000.00. Kind, W. L. non-part. with a-annual premium of $54.76. Insert form of policy. Insert An'l. Semi-An. Applied for ——. Quar. or Mo. ——.

12. Have you paid the agent taking this application the premium on the same? No. Will pay on delivery.

This application, Made to the Western Life Indemnity Company of Chicago is the basis and a part of a proposed Contract for Insurance, subject to the charter of the Company and the laws of the State of Illinois. I hereby agree that all the foregoing statements and answers, and all those that I make to the Company's Medical Examiner in Part Two of this application are by me warranted to be true, and are offered to the Company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect until the first premium shall have been paid, during my continuance in sound health, and the policy shall have been executed and issued by the Company. I further agree that in any distribution of surplus the principle and methods which may then be in use by the Company for such distribution, and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in the contract.

I hereby warrant and agree that during one year following the date of issue of the Contract of Insurance for which application is hereby made, that the liability of the Company shall be limited to the amount of Premiums paid on this policy should I engage in any of the following extra hazardous occupations or employments: retailing intoxicating liquors, handling electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture of hi-ly explosive substances, service upon any rail-
95 road freight train or track, or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the Company; that I will not die by my own act, whether sane or insane, during the period of one year next following said date of issue.

I further agree to accept and abide by the by-laws, rules and regulations of the Company, as they now are or may be lawfully changed hereafter.

Dated at Louisville, Sept. 1, 1907.

—— ——, *Agent.*
Signature of person or persons soliciting and securing application.

—— ——, *Manager.*

his
GEORGE X McCORMICK.
mark
Signature of person who- life is proposed for insurance.

No other form of receipt for advance payment of Premium will be recognized by the Company.

If the premium is paid in advance this receipt must be completed and given to the applicant; if the premium is not paid the receipt must not be detached.

An application for a $— Policy having be-n made by —— ——,

The Western Life Indemnity Company, Masonic Temple, Chicago, Ill., there has been collected from him — Dollars to be considered the first — premium on said (Annual, Semi-annual, Quarterly or Monthly) Policy, provided the application is approved by the Company, at its Home Office. If the application is not so approved the sum collected will be returned.

—— ——, *Agent.*

96 #48871. Exhbiit "A." No. 23892. Western Life Indemnity Company, Chicago. Whole Life Policy Issued to George McCormick, Louisville, Kentucky. Amount $1,000. Date, September 20th, 1907.

Jefferson Circuit Court, Common Pleas Branch, Second Division. Clarence Rupp. Exhibit A. Western Life Indemnity Co. 8¼.

CHICAGO, ILL.

Received of Western Life Indemnity Company — Dollars in full for all claims under this Policy No. — now terminated by —.

——— ———.
——— ———.
——— ———.

In presence of

——— ———.

Filed Dec. 8, 1911.

NAPIER ADAMS, *C. C. A.*

97 Afterward at a Court of Appeals held as aforesaid on January 9, 1912, the following order was entered, to-wit:

WESTERN LIFE INDEMNITY COMPANY,
vs.
RUPP.
Jefferson.

Ordered that this cause be submitted.

Afterward at a Court of Appeals held as aforesaid on the 12th day of March, 1912, the following orders and judgments were entered:

WESTERN LIFE INDEMNITY COMPANY, Appellant,
vs.
CLARENCE RUPP, Appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed. Which is ordered to be certified to said Court.

It is further considered that appellee recover of appellant his costs herein expended.

At the same time, to-wit: on the 12th day of March, 1912, the Court of Appeals of Kentucky delivered an opinion herein, in words and figures following, to-wit:

98 Court of Appeals of Kentucky.

March 12, 1912.

WESTERN LIFE INDEMNITY CO., Appellant,
vs.
CLARENCE RUPP, Appellee.

From the Jefferson Circuit Court, Common Pleas, Second Division.

Opinion of the Court by Chief Justice Hobson.

On September 7, 1907, the Western Indemnity Company issued to George McCormick two policies each insuring his life in the sum of $1,000, for the benefit of his nephew, Clarence Rupp if living, otherwise for the benefit of his executors, in consideration of the sum of $54.76 to be paid annually. The premiums were paid during the life of McCormick and this suit was brought by Clarence Rupp against the company to recover on the policy. The company entered a motion to quash the process; the motion was overruled. It then filed a general and special demurrer to the petition. The general demurrer was sustained, and the petition dismissed. From this judgment an appeal was taken by Rupp to this court. On the appeal it was held that Rupp though having no insurable interest in the life of his uncle, could recover on the policy. The judgment was reversed and the cause remanded to the circuit court for further proceedings consistent with the opinion. (Rupp v. Western Life Indemnity Co., 138 Ky., 18.) On the return of the case to the circuit court, the defendant filed an answer to which the circuit court sustained a demurrer and the defendant failing to plead further, the court entered judgment in favor of the plaintiff. The Indemnity company appeals.

99 It is too late now to raise the question that the process was not properly served. This question should have been presented on the first appeal. On that appeal the case was heard here on the merits and if is too late after a reversal on the merits to raise any question as to the sufficiency of the process. (McDowell v. C. O. & S. W. R. R. Co., 90 Ky. 346, I. C. R. R. Co. v. Glover, 24 R. 1419.)

In the answer the defendant pleaded that it was a corporation formed under the laws of Illinois, and that by the statute of Illinois it was prohibited from issuing a policy upon a life in which the beneficiary had no insurable interest. The section of the statute relied on is in these words:

"No corporation doing business of life insurance under this act shall issue a certificate or policy upon the life of any person more

than sixty five years of age, excepting in case of transfer of policy holders as provided herein, nor upon a life in which the beneficiary named has no insurable interest. Any assignment of the policy or certificate to a person having no insurable interest in the insured life shall render such a policy or certificate void."

The act referred to is entitled, An act to incorporate certain companies and "to control such companies of this state and other states doing business in this state * * * and fixing the punishment for violation of the provisions thereof." We have examined the act with care and find that it not only contains a scheme for the incorporation of these companies and their management and supervision by the State, but also provides how actions against them are to be tried. To whom a policy of insurance may be assigned when the policy has been issued in Kentucky and the assignment is made in Kentucky may be regulated by the laws of Kentucky. The statutes of one State ordinarily have no operation in another State. It is true that a corporation formed under the laws of one State has only the powers conferred upon it in the State of its
100 origin, but when a foreign corporation is permitted by another State to come within it and make contracts, the State which thus gives its permission may regulate the validity of the contracts thus made. Upon an inspection of the whole act we are satisfied that the section above quoted was not intended by the Legislature of Illinois to have an extra territorial effect. It was only intended to regulate the business done in Illinois. The act is a general one governing this character of business and evidently refers to business done in Illinois. When a company comes to Kentucky and issues policies in Kentucky, the validity of these Kentucky contracts must be determined by the laws of Kentucky under which the contracts were made. That this contract was valid under the laws of Kentucky was decided on the former appeal of this case.

When in the charter of an incorporated company restrictions are imposed as to the kind of business it may do, such limitations upon the power of the company ordinarily follow it wherever it goes, that is, when such a company comes into another State, it has only the powers which its charter confers. But that is not this case. The act in question is a general law regulating insurance companies and was evidently designed as a regulation of the business in the State of Illinois. It has no application to the business done in Kentucky. If this policy had been made payable simply to the executors of the insured and had afterward been assigned by him to his nephew, Clarence Rupp, it could hardly be maintained that the assignment being valid under the laws of Kentucky, could be held invalid because of the statute of Illinois, and this being so, it is hard to see why the policy might not be made payable in the first place to the nephew, Clarence Rupp.

Judgment affirmed.

EDWARDS, OGDEN & PEAK,
For Appellee.

BERCKLEY & SCOTT,
HENRY BURNETT,
THOS. J. GRAYDON,
For Appellant.

101 Afterwards, to-wit, on the 7th day of August, 1912, the appellant and plaintiff in error, Western Life Indemnity Company of Illinois, filed in the office of the Clerk of the Court of Appeals its Assignment of Errors which is in words and figures following, to-wit:

Court of Appeals of Kentucky.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS, Plaintiff in Error,

vs.

CLARENCE RUPP, Defendant in Error.

Assignment of Errors.

Now comes plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of Kentucky, in the case of Western Life Indemnity Company of Illinois, Appellant, vs. Clarence Rupp, Appellee, there is manifest error to-wit:

1. That the Court erred in holding that contracts of insurance issued by a foreign insurance company to a resident of the State of Kentucky, contrary to the organic law under which the company was incorporated, are valid contracts and binding upon the insurance company.

102 2. That the Court erred in holding that the question of jurisdiction of the person of a foreign company is waived by appeal from a judgment in favor of said company when the question of the jurisdiction of said company was expressly raised and objected to at the time said judgment was rendered.

3. That the Court erred in failing to give full faith and credit to the public acts of the State of Illinois under which and by virtue of which the insurance company was organized and existed.

4. That the Court erred in its judgment that the contracts of insurance were valid and binding obligations on appellant, Western Life Indemnity Company of Illinois.

BECKLEY & SCOTT,
HENRY BURNETT,
Attorneys for Western Life Indemnity Company of Illinois.

At the same time, to-wit, August 7th, 1912, the appellant and plaintiff in error, Western Life Indemnity Company of Illinois, filed in the office of the Clerk of the Court of Appeals of Kentucky, its petition for a Writ of Error and the allowance of same by the Chief Justice of the Court of Appeals, and which is attached hereto as part hereof, as follows:

103 Court of Appeals of Kentucky.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS, Plaintiff in Error,
vs.
CLARENCE RUPP, Defendant in Error.

Petition for Writ of Error.

To the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky:

The petition of the Western Life Indemnity Company of Illinois respectfully shows:

That heretofore to-wit on the 21st day of March, 1911, there was tried in the Circuit Court of Jefferson County, Kentucky, a case in which Clarence Rupp was plaintiff and your petitioner defendant.

That said case was an action brought to recover the sum of Two Thousand ($2,000.00) Dollars upon two (2) policies of insurance (each for One Thousand Dollars), issued by the Western Life Indemnity Company of Illinois on the life of one George McCormick and in which said Clarence Rupp, plaintiff therein, was named as beneficiary; that defendant, Western Life Indemnity Company's contentions were that said policies were void and that no recovery could be had thereon; that said Court entered a judgment against said defendant, Western Life Indemnity Company, for the full amount of said policies with interest.

Plaintiff in error states that within the time allowed by law it prayed and was granted an appeal from said judgment to the Court of Appeals of Kentucky, that being the highest court of law or equity in said State in which a decision could be had in said
104 case, assigning on said appeal the errors of the Circuit Court of Jefferson County as follows:

1. Service on the Insurance Commissioner of the State of Kentucky was not sufficient to bring said insurance company within the jurisdiction of the State Court when the insurance company has not filed with the Commissioner a resolution adopted by its board of directors consenting that service of process might be had in that manner, as set forth in the Statute authorizing such service.

2. The policies were issued by the Western Life Indemnity Company, a foreign insurance company, to a resident of Kentucky contrary to the organic law under which the insurance company was incorporated and the policies were therefore void and no recovery could be had thereon.

Your petitioner further shows that each of said grounds raised and presented a federal question in that plaintiff in error was and is a citizen of the State of Illinois and that by said judgment full faith and credit was not given to the statutes of the State of Illinois and the public acts of said State contrary to Article 4, Section 1 of the Constitution of the United States and that said judgment divested plaintiff in error of its property without due process of law

contrary to Article 5 of the Constitution of the United States; that the controversy herein was between citizens of different States to-wit, the State of Illinois and the State of Kentucky.

Plaintiff in error further shows that said judgment of the Court of Appeals of Kentucky was and is a final judgment in the highest Court of the State of Kentucky in which a decision in said suit could or can be had.

105 Plaintiff in error further shows that said federal questions were made in said case as hereinbefore set out and that said judgment of said Court of Appeals of Kentucky was repugnant to and in conflict with the laws of the United States and that a decision on said federal questions was necessary to the judgment rendered.

Wherefore, your petitioner, the plaintiff in error, presents herewith a transcript of the record of the Court of Appeals of Kentucky in said case and prays that a Writ of Error to said Court of Appeals be allowed; that the citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of the Statute in such cases made and provided, said bond and writ of error may operate as a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Court of Appeals of Kentucky be reversed.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS,
By BECKLEY & SCOTT,
HENRY BURNETT,
Its Attorneys.

The Writ of Error as prayed for in the foregoing Petition is hereby allowed this 5 day of August, 1912. The Writ of Error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $4,000.00.

J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

Have seen.

EDWARDS, OGDEN & PEAK,
Att'ys for Clarence Rupp.

105½ [Endorsed:] Court of Appeals of Kentucky. Western Life Indemnity Company of Illinois vs. Clarence Rupp. Petition for Writ of Error. Filed Aug. 7, 1912, Robt. L. Greene, C. C. A. Beckley & Scott, Henry Burnett, Attorneys for Western Life Indemnity Company of Illinois.

106 At the same time, to-wit, August 7th, 1912, a Writ of Error was filed in the office of the Clerk of the Court of Appeals of Kentucky, which is attached hereto and returned herewith as part hereof.

107 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of Kentucky, of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the state of Kentucky, before you, or some of you, being the highest Court of Law or Equity of said state in which a decision could be had in the said suit between the Western Life Indemnity Company of Illinois, appellant, and Clarence Rupp, appellee, wherein was drawn in question the validity of a statute of or authority exercised under the Constitution and laws of the United States, and the decision was against their validity, or wherein was drawn in question the validity of the statutes of, or authority exercised under, said state, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution or Statute of the United States, and the decision was against the right specially set up or claimed under such clause of the said Constitution or statute of the United States, a manifest error hath happened to the great damage of the said Western Life Indemnity Company of Illinois, plaintiff in error, as by their complaint appears, we being willing that
108 error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 2nd day of September, 1912, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 6th day of August, A. D. 1912, and of the Independence of the United States of America the 137th year.

[Seal District Court of the United States, West. Dist. Ky.]

A. G. RONALD,
Clerk of the United States District Court for the Western Judicial District of Kentucky at Louisville,

By HENRY F. CASSIN,
Deputy Clerk.

Allowed by

J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

108½ [Endorsed:] Filed Aug. 7, 1912. Robt. L. Greene, C. C. A.

109 At the same time, to-wit, August 7th, 1912, a Writ of Error Bond was executed by the Appellant and Plaintiff in Error, Western Life Indemnity Company of Illinois, and filed in the office of said Clerk and is in words and figures following, to-wit:

Court of Appeals of Kentucky.

WESTERN LIFE INDEMNITY COMPANY OF CHICAGO, Plaintiff in Error,

vs.

CLARENCE RUPP, Defendant in Error.

Supersedeas Bond on Writ of Error.

Know all men by these presents: That we, Western Life Indemnity Company of Illinois, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Clarence Rupp in the sum of $4,000.00 to be paid to said obligee, his successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

110 Sealed with out seals and dated this 3rd day of August, 1912.

Whereas, the Western Life Indemnity Company of Illinois, plaintiff in error, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

WESTERN LIFE INDEMNITY CO. OF ILLINOIS,
By BECKLEY & SCOTT, *Att'ys.*
FIDELITY & DEPOSIT CO. OF MARYLAND,
By EDW. J. WATKINS.

I hereby approve the foregoing bond and sureties this 5th day of August, 1912.

J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

111 Form "A." Judicial.

Power of Attorney.

Fidelity and Deposit Company of Maryland,
Home Office: Baltimore, Maryland.

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, by John H. Wight, its Vice-President, and Thos. L. Berry, its Assistant Secretary, in pursuance of a certain resolution duly passed by the Board of Directors of said Company at a regular meeting of that body held on the 6th day of July, 1898, a copy of which is hereto attached, does hereby nominate, constitute and appoint Willis S. Mullen, Alex. W. Tippett and Edward J. Watkins, all of the City of Louisville, State of Kentucky, Each its true and lawful agent and attorney-in-fact, to make execute, seal and deliver for and on its behalf and as its act and deed, all bonds or undertakings of suretyship in penalties not exceeding the sum of one hundred thousand dollars ($100,000) each, required to be given by Statute, Order or Decree of any Court of Law or Equity of the State of Kentucky and Indiana or in the United States Circuit or District Courts for said State, and for Trustees and Receivers in Bankruptcy proceedings under the Bankrupt Act of the United States. Such bonds to be signed for the Company by —— ——. And the execution of such bonds in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

This power of attorney revokes that of April 5, 1907, to Willis S. Mullen and Alex. W. Tippett.

In witness whereof, the said John H. Wight, Vice President and Thos. L. Berry, Assistant Secretary, have hereunto
112 subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland this 6th day of November, A. D. 1908.

(S'g'd & Sealed) JOHN H. WIGHT,
Vice-President.

Attest:
THOS. L. BERRY,
Assistant Secretary.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 6th day of July 1898, the following resolution was unanimously adopted, to-wit:

"Whereas, it frequently becomes necessary for a representative of the Company to execute a bond on behalf of the Company, for which, for the lack of time or some other cause, it is impossible to have executed by the regularly elected officers of the Company;

Therefore be it resolved, that the President, or either of the Vice-Presidents, by and with the concurrence of the Secretary or Assistant

Secretary, is hereby authorized to employer any representative of the Company to execute, on behalf of the Company, any bond which the Company might execute through its duly elected officers."

We, John H. Wight, Vice-President, and Thos. L. Berry, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, hereby certify that the foregoing is a true copy taken from the Records of Proceedings of the Board of Directors of the Fidelity and Deposit Company of Maryland, and is still in force.

In testimony whereof, We have hereunto subscribed our names as Vice-President, and Assistant Secretary, respect*fully*, and affixed the Corporate Seal of the Fidelity and Deposit Company this 6th day of November, A. D. 1908.

(S'g'd & Sealed)

JOHN H. WIGHT,
Vice-President.

THOS. L. BERRY,
Assistant Secretary.

113 STATE OF MARYLAND,
City of Baltimore, ss:

On this 6th day of November, A. D. 1908, before the subscriber a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came John H. Wight, Vice President, and Thos. L. Berry, Assistant Secretary of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

(S'g'd & Sealed)

FRED. S. AXTELL,
Notary Public.

We, John H. Wight, Vice-President, and Edgar F. Dobson, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, hereby certify that the aforegoing is a true and correct copy of power of attorney issued on November 6, 1908, in behalf of Willis S. Mullen et al., all of — and is still in force.

In testimony whereof, we have hereunto subscribed our names as Vice-President and Assistant Secretary, respectively and affixed the Corporate Seal of the Company this 4th day of March, A. D. 1910.

JOHN H. WIGHT,
Vice-President.

EDGAR S. DODSON,
Assistant Secretary.

114 STATE OF MARYLAND,
City of Baltimore, ss:

[SEAL.]

Subscribed and sworn to before me, a Notary Public of the State of Maryland, in the City of Baltimore, this 4th day of March, A. D. 1910.

[SEAL.] FRED S. AXTELL,
Notary Public.

Commission Expires May 1910.

115 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the entire record with all things touching same, in the case of Western Life Indemnity Company, Appellant vs. Clarence Rupp, Appellee, as the same appears from the records and files of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at the Capitol in the City of Frankfort on this the 15th day of August A. D., 1912.

[Seal Kentucky Court of Appeals.]

ROBT. L. GREENE,
Clerk Court of Appeals of Kentucky.

Fee for this transcript, $35.20.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Clarence Rupp, Greeting:

You are hereby cited and admonished to appear at a session of the Supreme Court of the United States at Washington on the 2nd day of September A. D. 1912, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of Kentucky, wherein the Western Life Indemnity Company, of Illinois is plaintiff in error, and Clarence Rupp is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 6 day of August, 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Citation accepted for defendant in error this 22d day of Aug., 1912.

EDWARDS, OGDEN & PEAK,
Att'ys for Clarence Rupp.

[Endorsed:] Filed Aug. 7, 1912. Robt. L. Greene, C. C. A.

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Clarence Rupp, Greeting:

You are hereby cited and admonished to appear at a session of the Supreme Court of the United States at Washington on the 2nd day of September A. D. 1912, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of Kentucky, wherein the Western Life Indemnity Company, of Illinois is plaintiff in error, and Clarence Rupp is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, this 6 day of August, 1912.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Citation accepted for defendant in error this 22nd day of Aug., 1912.

EDWARDS, OGDEN & PEAK,
Att'ys for Clarence Rupp.

118 [Endorsed:] Filed Aug. 7, 1912. Robt. L. Greene, C. C. A.

Endorsed on cover: File No. 23,339. Kentucky Court of Appeals. Term No. 333. Western Life Indemnity Company of Illinois, Plaintiff in Error, vs. Clarence Rupp. Filed August 26th, 1912. File No. 23,339.

Office Supreme Court, U. S.
FILED
MAR 28 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. [redacted]50

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS, - - - Plaintiff in Error,

versus

CLARENCE RUPP, - - - - - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief and Argument for Plaintiff in Error.

HENRY BURNETT,
THOMAS J. GRAYDON,
PENDLETON BECKLEY,
JOHN M. SCOTT,
Counsel for Plaintiff in Error.

H. W. BATSON,
GRADDY CARY,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

	PAGE
Statement of facts as to jurisdiction	1
Substituted service of summons on plaintiff in error not valid	5
Illegality in service of process not waived by plaintiff in error	5
Argument as to lack of jurisdiction of State Court,	8 to 14
Statement of facts as to limitations in the charter of the plaintiff in error	14-18
Policies sued on were issued contrary to the provisions of the Statutes of Illinois	14-23
Powers of a corporation doing business in another State	18
Provisions of Statute of Illinois as to assessment insurance companies	23
Constitution of Illinois forbids creation of corporations by special acts	23-26
Limitations in the charter of a foreign corporation follow it into Kentucky	26
Insurable interest essential to validity of insurance by assessment companies under the Statutes of Illinois	31
The contract of insurance herein was *ultra vires* and company not estopped to plead same	38

AUTHORITIES CITED.

PAGE

Bell & Coggeshall v. Kentucky Glass Works, etc., 20 Ky. Law Rep. 1089 8-44

Blitz & Co. v. Bank of Kentucky, etc., 21 Ky. Law Rep. 1556 8-43

Bloomington Mutual Life Ben. Ass'n v. Blue, 120 Ill. 121 7-34

Bucki, L. & Son Lumber Co. v. Atlantic Lumber Co., 128 Fed. 332 6-19

Canada Southern R'y Co. v. Gebhart, 109 U. S. 527.. 6

Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24 8-40

Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484 7

Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484 25

Constitution of U. S., Art. 4, Sec. 1 6-18

Constitution of State of Illinois, Art. 11, Sec. 1 24

Cooley's Briefs on Insurance, pp. 245-246-251 ...7-32-33

Civil Code, Ky., Sec. 92 9

C. & O. S. W. R. Co. v. Heath's Admr., 87 Ky. 651 (1888) 10

Clark & Marshall on Private Corporations, Vol. 3, Sec. 840 6-19

Fraternal Insurance Act of Illinois (1893) 30-31

Grace v. Taylor, 1 Bibb 430 (1809) 10

Greene v. Middlesboro Town & Land Co., 89 S. W. Rep. 229 8-45

PAGE

Georgetown Water Co. v. Central Thompson-Huston Co., 17 Ky. Law Rep. 1270 8-44

General Life Insurance Act of Illinois, Sec. 18 30

Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257, 6-19

Harkness v. Hyde, 98 U. S. 476 12

Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573 12

I. C. R. R. Co. v. Glover, 71 S. W. 630 5-9

Illinois Assessment Ins. Co. Act, Sec. 9, approved June 22, 1893 7

Illinois Statute as to Assessment Companies 34-35

Jessamine County v. Newcomb-Buchannan Co., 8 Ky. Law Rep. 692 8-44

Johnson v. Joliet, etc., R'y Co., 23 Ill. 129 25

Kentucky Court of Appeals Opinion in instant case. 16

Kentucky Statutes, Sec. 631 2-5

Legislative Act of State of Illinois as to Assessment Companies 17

Manhattan Life Ins. Co. v. Field, 26 S. W. (Texas) 280-282 6-21

McDowell v. C. & O. R. R. Co., 90 Ky. 346 5-9

Michigan State Bank v. Gardner, 15 Gray (Mass.) 362 6-19

Mutual Reserve Life Ins. Co. v. Phelps, 190 U. S. 147 5-13

Mutual Guaranty Fire Ins. Co. v. Barker, 107 Iowa, 143 8

Murphy v. City of Louisville, 9 Bush (Ky.) 189 8-44

Nathan v. Lee, 52 N. E. 987 7-21

National Home Building & Loan Ass'n v. Home Savings Bank, 181 Ill. 34 8-40

PAGE

"Non Forfeiture Statute" of State of New York .. 29

Oregon R'y v. Oregonian R'y Co., 130 U. S. 1 21-40

Pennsylvania Rd. Co. v. St. Louis, etc., Rd., 118 U. S. 290-630 40

Pierce v. Crompton, 13 R. I. 312 6-19

Railway Companies v. Keokuk Bridge Co., 107 U. S. 371 39

Relph v. Rundle, 103 U. S. 226 8-43

Rue v. Missouri Pacific R'y, 8 S. W. Rep. 533 6-20

Rupp v. Western Life Indemnity Co., 138 Ky. 18 .. 46

Scott v. Stockholders' Oil Co., 142 Fed. 287 6-19

Seattle Gas & Electric Co. v. Citizens Light & Power Co., 123 Fed. 588 8-41

Southern Pacific Co. v. Denton, 146 U. S. 206 12

State v. Southern Pacific Co., 28 Southern Rep. 372, 7

State v. Tobacco Co., 75 S. W. (Mo.) 737 8-43

State v. Southern Pacific Co., 28 Southern Rep. 372, 21

Story on Conflict of Laws, 175 (Note) 6-18

Thompson on Corporations (2d Ed.), Vol. 5, Sec. 6627 6-19

Thomas v. Railroad Co., 101 U. S. 71 6-22-40

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 333.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS, - - - - - - *Plaintiff in Error,*

versus

CLARENCE RUPP, - - - - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

May it please the Court:

Plaintiff in error, Western Life Indemnity Company, is an Illinois corporation and was organized under the general laws of that State, applicable to life insurance, and was never authorized by Kentucky to do business in the State, and never carried on business in the State.

In September, 1907, an application was made to it

to insure the life of George McCormick, a resident of Louisville, Ky.

Two policies, of $1,000.00 each, were issued and delivered to the insured, the named beneficiary in each being Clarence Rupp, defendant in error.

After the death of the insured, on October 18, 1907, suit was brought by Rupp against the company in the Jefferson Circuit Court at Louisville, Kentucky. It was not alleged that the company was doing business in Kentucky, nor that it had been authorized thereto.

A summons was issued to Jefferson County and was returned by the sheriff endorsed "the within named not found."

Thereupon a summons was issued, addressed to the sheriff of Franklin County, Kentucky, that being the seat of the State Government. This summons was served on the Insurance Commissioner of the State, for and on behalf of the plaintiff in error. (P. 5, transcript.)

The Kentucky Statute which authorizes such service is Sec. 631:

> "Before authority is granted to any foreign insurance company to do business in this State, *it must file with the Commissioner, a resolution, adopted by its board of directors, consenting that service of process* upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State shall be a valid service upon said company; and if process is served upon the Commissioner, it shall be his duty to at once send it by mail, addressed to the company at its principal office * * *"

On April 1, 1908, the insurance company made a special appearance to the action and moved to quash the return on summons (p. 6, transcript).

Affidavits of Pendleton Beckley and of George M. Moulton, president of the insurance company, were filed in support of the motion (pp. 7-8-9-10).

No counter-affidavits were filed and no evidence adduced.

On the 16th of May, 1908, the motion to quash was overruled by the court (p. 10).

On the 30th of May, 1908, the insurance company filed its answer (pp. 11-12).

The answer reserves and reiterates its plea to the jurisdiction, in these words:

> "The defendant, the Western Life Indemnity Co., without waving its objection to the jurisdiction of this court of its person, says that it did not file with the Commissioner of Insurance a resolution of its Board of Directors consenting that service of process be had upon said Commissioner of Insurance."

The second paragraph of the answer expressly reserves the objection to the jurisdiction of the person, and objects to the ruling of the court as to jurisdiction of the person of the defendant (p. 11).

The defendant in error entered a general demurrer to the answer, and the court, on its own motion, carried the demurrer back to the petition and sustained same (p. 19), and the defendant in error, declining to plead further, the petition was dismissed (p. 22).

Defendant in error excepted and prayed an appeal to the Court of Appeals of Kentucky, which was granted (p. 22).

On April 26, 1910, the Court of Appeals reversed the lower court, saying (p. 25):

> "The (lower) court dismissed it (petition) upon the ground that appellant, a nephew of McCormick, had no insurable interest in his uncle's life; that such a contract partook of the nature of a wager and was void as being against public policy. *And this is the only question necessary or proper to be considered upon this appeal.*"

This is the only question that could have been decided or raised.

The plaintiff in error, on the appeal by the beneficiary, Rupp, whose petition had been dismissed absolutely, could not have raised in the Court of Appeals the question of jurisdiction of its person. We know of no rule of practice that would have authorized the insurance company to raise that question on such an appeal. It would have required it to take a cross appeal, on a moot question—a question not involved in the appeal.

On the return of the case, plaintiff in error filed a second amended answer (p. 36) in which it expressly reserves its objection to the jurisdiction of the court of its person. (See 1st paragraph.)

A demurrer to this amended answer was sustained, and, the insurance company declining to plead further, a judgment for $2,000.00 was rendered *in personam*.

On the second appeal to the Court of Appeals the

court was asked to decide the question of jurisdiction of the person raised in the court below and which was never waived.

The court said as to that question (p. 54):

> "It is too late *now* to raise the question that the process was not properly served. *This question should have been presented on the first appeal.* On that appeal the case was heard on the merits, and it is too late after reversal on the merits to raise any question as to the sufficiency of the process."

The court cites McDowell v. C. & O. R. R. Co., 90 Ky. 346 and I. C. R. R. Co. v. Glover, 24 R. 1419, 71 S. W. 630.

BRIEF.

1. A foreign insurance company sued in a State court of Kentucky can not lawfully be summoned by a substituted service on the State Insurance Commissioner, unless it has been licensed to do business in the State, and unless it has, by resolution of its Board of Directors, assented to such substituted service.

Sec. 631, Ky. Stats.
Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573.
Mutual Reserve Life Ins. Co. v. Phelps, 190 U. S. 147.

2. Illegality in the service of process by which jurisdiction is to be obtained, is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Such illegality is considered as

waived, only when he, without having insisted upon it, pleads in the first instance to the merits.

Harkness v. Hyde, 98 U. S. 476.

3. Full faith and credit must be given in each State to the public acts of every other State.

Constitution of United States, Article 4, Section 1.

4. A corporation doing business in a foreign State can exercise in that State only such powers as are granted to it by the laws of the State in which it is organized.

Story on Conflict of Laws, page 175. (Note.)
3 Clark and Marshall on Private Corporations, Section 840.
5 Thompson on Corporations (Second Edition), Section 6627.
Canada Southern Railway Co. v. Gebhard, 109 U. S. 527.
Pierce v. Crompton, 13 R. I. 312.
Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257.
Scott v. Stockholders Oil Co., 142 Fed. 287.
L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 128 Fed. 332.
Michigan State Bank v. Gardner, 15 Gray (Mass.) 362.
Rue v. Missouri Pacific Railway, 8 Southwestern Rep. 533.
Manhattan Life Ins. Co. v. Field, 26 Southwestern Rep. (Texas) 280, 282.
Oregon Railway, etc., v. Oregonian R'y Co., 130 U. S. 1.
State v. Southern Pacific Co., 28 Southern Rep. 372.
Nathan v. Lee, 52 Northeastern Rep. 987.
Thomas v. R. R. Co., 101 U. S. 71.

5. The present Constitution of the State of Illinois, adopted in 1870, provides that no corporation shall be created by special laws.

Present Constitution of the State of Illinois, adopted in 1870, Article 11, Section 1.
Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 65 Northeastern Reporter, 451, 463.

6. The restrictions placed upon a corporation organized in the State of Illinois follow the corporation into every State in which it attempts to transact business.

Section 9 of the Illinois Assessment Insurance Company Act, approved June 22, 1893.
Story on Conflict of Laws, page 175. (Note.)
3 Clark & Marshall on Private Corporations, Section 840.
Pierce v. Crompton, 13 R. I. 312.
State v. Southern Pacific Co., 28 Southern Reporter, 372.
And other cases cited under Clause 4, *supra*.

7. Insurable Interest.

Assessment Life Insurance Companies alone are prohibited by the Statutes of Illinois from issuing policies in favor of a beneficiary who has no insurable interest in the life of the insured.

Section 9 of the Illinois Assessment Insurance Company Act, approved June 22, 1893.
1 Cooley's Briefs on Insurance, pages 245, 246, 251 and 252.
Bloomington Mutual Life Ben. Assn. v. Blue, 120 Ill. 121, 11 Northeastern Reporter, 331.

8. The appellant company is not estopped from pleading that the contract of insurance herein was *ultra vires.*

Mutual Guaranty Fire Ins. Co. v. Barker, 107 Iowa, 143.
National Home Building and Loan Association v. Home Savings Bank, 181 Ill. 35, 54 Northeastern Rep. 619.
Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24.
Seattle Gas & Electric Co. v. Citizens Light & Power Co., 123 Fed. 588.
State v. Tobacco Co., 75 Southwestern Reporter (Mo.) 737.
Relph v. Rundle, 103 U. S. 226.
Blitz & Co. v. Bank of Kentucky, etc., 21 Ky. Law Rep. 1554.
Murphy v. City of Louisville, 9 Bush (Ky.) 189.
Jessamine County v. Newcomb Buchanan Co., 8 Ky. Law Rep. 692.
Bell & Coggeshall Co., etc., v. Kentucky Glass Works, etc., 20 Ky. Law Rep. 1089.
Georgetown Water Co. v. Central Thompson-Houston Co., 17 Ky. Law Rep. 1270.
Green v. Middlesborough Town & Land Co., 89 Southwestern Rep. 229.

ARGUMENT.

With due respect we insist that neither of the two cases cited by Kentucky Court of Appeals on second appeal is authority in the instant case.

In the McDowell case the Railroad Co. filed a special demurrer to the jurisdiction, and, at the same time, a general demurrer.

Sec. 92, Civ. Code, reads:

"A special demurrer is an objection to a pleading *which shows* that the court has no jurisdiction of the defendant or of the subject of the action."

The court in the McDowell case, p. 347, uses this significant language as to the special demurrer:

"No question was raised in this court as to the jurisdiction of the lower court over the person of the defendant, *and none could have been made*, as the petition failed to disclose any fact upon which the jurisdictional question could have been raised."

The case decides only one question and it appears in the syllabus:

"A defendant by filing a general demurrer to the petition waives his right to thereafter question the jurisdiction of the court over his person."

The opinion holds that a person denying the jurisdiction must seek a decision of that question before he files his answer to the merits and before he seeks a decision of the law questions by filing a general demurrer.

The court, in effect, holds that the special demurrer was a vain effort, for the simple reason that the petition failed to disclose any grounds therefor.

In Ills. Central R. R. Co. v. Glover, 71 S. W. 630, it appears that the railroad company first filed a general demurrer to the petition, and, after obtaining the judgment of the court on the sufficiency of the complaint, it filed its answer in which it sought to question the jurisdiction of the person. The court properly ruled that it was too late to raise the question after demurring generally.

In the instant case, before answering to the merits, and without filing any demurrer, the insurance company moved the court to quash the return on the summons, and in support filed two affidavits which are not controverted. The motion was as follows (p. 6):

> "The defendant, the Western Life Indemnity Company of Illinois, with leave of court for the purpose of making this motion and for this purpose alone, hereby enters its special appearance and moves the court to quash the return on the summons herein."

The two affidavits show that the insurance company, prior to issuing the policies sued on, had applied to the Insurance Commissioner of Kentucky for leave to do business in the State; that its application had been refused by the Commissioner; that its Board of Directors had never adopted any resolution by which it consented that service of summons on the Commissioner should be a valid service on the company, and that the company had never been notified by the Insurance Commissioner that summons had been served upon him as the authorized agent of the company for service of summons.

The company has never waived its right to object to being brought into court by service of summons on the Insurance Commissioner, but has insisted consistently and continuously from its first special appearance that the court did not have jurisdiction of its person.

The Kentucky Court of Appeals, beginning with Grace v. Taylor, 1 Bibb, 430 (1809) and down to C. O. & S. W. R. Co. v. Heath's Admr., 87 Ky. 651 (1888), has

held that an appeal from a judgment, void for want of proper process, places *appellant* in court, on return of the case, for all purposes of a trial. These cases have never been overruled, though, in Louisville Home Telephone Co. v. Beeler's Admr., 125 Ky., the older cases were adversely criticized and a different ruling made in that case without overruling any of them.

It was obviously out of deference to these older cases that the Kentucky Court of Appeals in the instant case held that though the plaintiff in error had not so intended, yet it had inadvertently or technically waived its right to raise the question of jurisdiction on the second appeal—the first appeal having been taken by its adversary. On that appeal only one question was submitted and only one could properly have been submitted to the court.

We maintain the plaintiff in error, by entering a special appearance for the sole purpose of objecting to the jurisdiction of the court of its person, and by filing affidavits in support thereof, was entitled to an order quashing the service. Its filing an answer to the merits, while reserving its objection to the jurisdiction, was within its constitutional rights.

After the trial court, on its motion, sustained a demurrer to the petition, the defendant in error appealed, and the only question involved in the appeal was the sufficiency of the petition.

The Appellate Court of Kentucky held the petition to be sufficient. At the next trial a demurrer to the answer was sustained, and plaintiff in error appealed, and,

for the first time, and at the first opportunity, presented to the appellate court the question of jurisdiction. The court held that that question was waived by not having been decided on the first appeal.

We maintain that the plaintiff in error is about to be deprived of its property without due process of law, and its constitutional protection is invoked.

In Harkness v. Hyde, 98 U. S. 476, this court held that when a summons was served on the defendant in an Indian Reservation—not embraced by the lines of Idaho territory—it was insufficient.

In that case defendant made a special appearance and moved the trial court to *dismiss the action* upon the ground that he had not been lawfully summoned. The motion was treated as one to quash the return on the summons. After it had been overruled, the defendant answered to the merits. A trial resulted in a verdict against him, and, on appeal to the State Supreme Court, it was affirmed. He then sued out a writ of error to this court, where it was held that the steps taken by defendant were proper and that the judgment against him must be reversed.

Southern Pacific Co. v. Denton, 146 U. S. 206. To same effect as to procedure of defendant in reserving its objection to the jurisdiction.

Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573, holds that the company's consent to a substituted service formed a part of the contractual obligation in every policy of insurance; and, though the company withdrew from the State and revoked its power of at-

torney to the Insurance Commissioner to receive service of summons, yet, that in a suit, brought after the revocation, on a policy issued prior to the revocation, the service was good.

On contracts made in another State, the plaintiff could not acquire jurisdiction over the company by service of summons on the Insurance Commissioner, after the withdrawal of the company from the State.

A fortiori it follows that in the instant case, service on the Insurance Commissioner is not valid, the company never having consented thereto and never having been required to consent, and never having carried on business in Kentucky.

In Mutual Reserve Fund Co. v. Phelps, 190 U. S. 147, substituted service under Sec. 631, Kentucky Statutes was considered, but the question involved in the instant case was not involved.

In that case the insurance company had been licensed by Kentucky to do business in the State; by a resolution of its Board of Directors express assent to a substituted service of process on the Insurance Commissioner had been given by the insurance company.

After a great volume of business had been written in the State, the license of the company was revoked and it ceased to do business in the State thereafter.

Phelps brought a suit in the State court against the company and caused process to be served on the Insurance Commissioner.

The subject matter of this suit was a breach of contract entered into while the company was doing busi-

ness in the State and while its express assent to a substituted service was in full effect.

This court held that the consent of the company to a substituted service extended to all suits on contracts in the State, entered into while the company was engaged in carrying on business in the State.

But in the instant case the company had never consented to a substituted service and had never been licensed to carry on business in the State.

We call the court's attention to the petition in the court below—(p. 1) where the defendant in error does not allege that the plaintiff in error is a corporation of Illinois, nor does he state where the company is incorporated.

Again, on p. 2, he fails to state where the insurance contract, sued on, was made, or where it was to be performed.

In the second amended answer of plaintiff in error, it is alleged that it is a corporation of the State of Illinois, and that it had never been licensed by the State of Kentucky, and that it had never consented to a substituted service, and these allegations were admitted by the demurrer.

FULL FAITH AND CREDIT MUST BE GIVEN IN EACH STATE TO THE PUBLIC ACTS OF EVERY OTHER STATE.

In Paragraph 1 of its answer the appellant pleads that the two policies upon which this ation is based were and are void, because issued in violation of the statutes

of the State of Illinois under which the appellant was incorporated and doing business; that Section 9 of such statutes of Illinois provided and provides that no corporation doing business under such act should issue a certificate or policy upon the life in which the beneficiary named in the policy has no insurable interest. It is also alleged in the answer that Rupp, the plaintiff, was the nephew of the insured and had no insurable interest by virtue of said relationship or otherwise in the life of the said insured. Further, the answer pleads Section 1, Article IV of the Constitution of the United States, to the effect that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and alleges that to hold defendant liable to pay said policies would be in violation of the law of the State of Illinois and would be a failure upon the part of the State of Kentucky to give such full faith and credit to the Act of the Legislature of the State of Illinois, under which appellant was created and doing business at the time said policies sued on were issued or attempted to be issued and under which said company still exists.

The applications attached to each policy, as well as the policies themselves, show that Clarence Rupp, the beneficiary, was the nephew of the insured, George McCormick. To such answer appellee, plaintiff below, interposed a demurrer, which was sustained, and the sustaining of this demurrer was assigned as error. The demurrer, of course, also admits the facts of lack of insurable interest stated in the answer.

The Court of Appeals of Kentucky in affirming the judgment of the lower court upon this point, after reciting the section of the Illinois Statute referred to, says:

> "We have examined the act with care and find that it not only contains a scheme for the incorporation of these companies and their management and supervision by the State, but also provides how actions against them are to be tried. To whom a policy of insurance may be assigned when the policy has been issued in Kentucky and the assignment is made in Kentucky may be regulated by the laws of Kentucky. The statutes of one State ordinarily have no operation in another State. It is true that a corporation formed under the laws of one State has only the powers conferred upon it in the State of its origin, but when a foreign corporation is permitted by another State to come within it and make contracts, the State which thus gives its permission may regulate the validity of the contracts thus made. Upon an inspection of the whole act we are satisfied that the section above quoted was not intended by the Legislature of Illinois to have an extra territorial effect. It was only intended to regulate the business done in Illinois. The act is a general one governing this character of business and evidently refers to business done in Illinois. When a company comes to Kentucky and issues policies in Kentucky, the validity of these Kentucky contracts must be determined by the laws of Kentucky under which the contracts were made. That this contract was valid under the laws of Kentucky was decided on the former appeal of this case.
>
> "When in a charter of an incorporated company restrictions are imposed as to the kind of business it may do, such limitations upon the power of the company ordinarily follow it wherever it goes, that is, when such a company comes into another State, it has only the powers which its charter confers.

> But that is not this case. The act in question is a general law regulating insurance companies and was evidently designed as a regulation of the business in the State of Illinois. It has no application to the business done in Kentucky." * * *

We respectfully submit that the error of the Supreme Court of Kentucky on this point will clearly appear from an examination of the rules of law, taken in connection with the statutes and judicial decisions of the State of Illinois on the same subject.

As set forth in defendant's answer and admitted by the demurrer, the defendant, Western Life Indemnity Company, is a corporation organized and existing under an Act of the Legislature of the State of Illinois, approved June 22, 1893, in force July 1, 1893, entitled:

> "An act to incorporate companies to do the business of life or accident insurance on the assessment plan and to control such companies of this State, and of other States doing business in this State, and to repeal a certain act therein named, and providing and fixing the punishment for violation of the provisions thereof."

Section 9 of this act is as follows:

> "No corporation doing business of life insurance under this act shall issue a certificate or policy upon the life of any person more than sixty-five years of age, excepting in case of transfer of policyholders as provided herein, nor upon a life in which the beneficiary named has no insurable interest. Any assignment of the policy or certificate to a person having no insurable interest in the insured life shall render such a policy or certificate void."

The Constitution of the United States, Article IV, Section 1, provides:

> "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

A CORPORATION DOING BUSINESS IN A FOREIGN STATE CAN EXERCISE IN THAT STATE ONLY SUCH POWERS AS ARE GRANTED TO IT BY THE LAWS OF THE STATE IN WHICH IT IS ORGANIZED.

It seems to be admitted that the general rule of law is, as stated by the Court of Appeals of Kentucky in this case, that a corporation formed under the laws of one State has only the powers conferred upon it in the State of its origin. And this also is the holding of the authorities generally on the subject.

Mr. Story in his Conflict of Laws, page 175 (NOTE), says:

> "The power of a corporation to act in a foreign country depends both on the law of the country where it was created and on the law of the country where it assumes to act. It has only such powers as were given to it by the authority which created it. It can not do any act by virtue of those powers in any country where the law forbids it so to act. It follows that every country may impose conditions and restrictions upon foreign corporations which transact business within its limits."

The same rule is laid down in 3 Clark & Marshall on Private Corporations, Sec. 840, as follows:

"Wherever a corporation goes for business," said Chief Justice Waite, "it carries its charter, as that is the law of its existence, * * * and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be reorganized and submitted to by those who deal with it elsewhere. A corporation is a creature of the law. It is always subject to the law of its charter, or if it has no special charter, then to the incorporation laws of the State or sovereignty under and by virtue of which it has been created; and though it may transact business in other jurisdictions, yet its charter or the laws to which it owes its existence have a paramount influence over its corporate powers wherever it undertakes to exercise them. Hence, to determine the capacity or disability of a corporation in a given case, regard must primarily be had to the laws of the State or sovereignty from which it has derived its franchises.

"And it follows that when the charter of a corporation requires that its contracts shall be made or other acts done by particular officers or agents, or in a certain mode, the provisions of the charter must be complied with when it acts in other States, for such a requirement is a limitation upon its powers."

To the same effect are:

5 Thompson on Corporations (2d Ed.), Sec. 6627.
Canada Southern R'y Co. v. Gebhard, 109 U. S. 527.
Pierce v. Crompton, 13 R. I. 312.
Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257.
Scott v. Stockholders Oil Co., 142 Fed. 287.
L. Buckeye, etc., Co. v. Atl., etc., Co., 128 Fed. 332.
Mich. State Bank v. Gardner, 15 Gray (Mass.) 362.

In Pierce v. Crompton, 13 R. I. 312, *supra*, the Supreme Court of Rhode Island held void an assignment in Rhode Island by a corporation created under the laws of New York on the ground that the corporation had not power under the laws of New York to make such an assignment, and in its opinion that court states the rule as follows:

> "A foreign corporation doing business in this State has only such powers as have been conferred upon it by the laws of the State to which it owes its existence; that it gains no additional power by doing business here, because this State does not give it any, but only allows it, as a matter of comity, to exercise such as it has; and consequently, inasmuch as the American Mills Company had no power under the laws of New York to make an assignment for the benefit of its creditors in contemplation of insolvency, that the voluntary assignments made by the company to the complainant, Thomas A. Pierce, are void.
>
> "The contract being void in its inception, no act of ratification could make it valid."

This is the syllabus in Rue v. Missouri Pacific Railway, 8 S. W. 533, and the Supreme Court of Texas further says in this case: "Appellee owes its existence to the Constitution and laws of the State of Missouri, under and by virtue of which it obtained its being, and from which it derived all its powers. Natural persons may make any contract, or perform any act not prohibited by law, while artificial persons (corporations) can do only those things which, by express grant or necessary implications, they are authorized or empowered to do by the laws of the State under which their charters were ob-

tained." This opinion is referred to and affirmed in Manhattan Life Insurance Co. v. Field, 26 S. W. (Texas), 280, 282.

In the case of Oregon Railway, etc., v. Oregonean Railway Co., 130 U. S. 1, the court holds that the powers of corporations are such and such only as are conferred upon them by the acts of the States under which they are organized.

And in the case of State v. Southern Pacific Company, 28 Southern Rep. 372:

> "A corporation can exercise in another State no power or authority which is not granted to it by charter under which it exists or by some other legislative act."

The Supreme Court of Indiana in Nathan v. Lee, 52 N. E. 987, decided in 1899, cites many cases of similar import and holds (page 989) "Another rule is that it is the restrictions or prohibitions contained in the charter of a foreign corporation, or those of the governing laws of the State where it is organized, in relation thereto, which follow it into another State. It is such restrictions or prohibitions as a general principle, and these alone, which under the rule of comity are recognized and enforced in other jurisdictions and not the general restrictions or judicial decisions of the State in which such corporation is organized. The general laws, regulations or decisions of the courts of a sister State are controlling only within its own limits, and such State has no power to give them force or effect in other jurisdictions."

The above authorities show conclusively that a corporation only has the power to do those things which are expressly granted in the charter or which are incidental to carry out the provisions.

In the case at bar, the general law, under which the insurance company was incorporated, *expressly forbids the issuance of the policies in question.*

The record is silent as to whether the contract was entered into within the State of Illinois or in the State of Kentucky.

The defendant was created with special and limited power. When it purported to enter into the contracts sued on, if made in the State of Kentucky the company was subject to any restrictions upon its powers imposed by the State of Kentucky. It can not be argued, however, that the State of Kentucky has done anything to increase the powers of the defendant company. A corporation only exists by virtue of its charter and the limitations imposed in that charter follow the corporation wherever it be. If this were not the case a corporation of the most limited powers created in one State could go into another State and transact any business imaginable, clothing itself with whatever new power is requisite for its new contract.

As was said in Thomas v. R. R. Co., 101 U. S. 71:

> "To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that, the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the courts."

The State of Kentucky has the right to impose conditions and restrictions upon the defendant company, or any other corporation desiring to do business in Kentucky, but could the State of Kentucky, even if it had attempted so to do, add one power to those already possessed by a foreign corporation? Subject, therefore, to the right wholly to exclude foreign corporations from the State and to regulate foreign corporations doing business in this State, a State must give "full faith and credit" to the statute which gives a foreign corporation life and power.

THE PRESENT CONSTITUTION OF THE STATE OF ILLINOIS, ADOPTED IN 1870, PROVIDES THAT NO CORPORATION SHALL BE CREATED BY SPECIAL LAWS.

The Court of Appeals of Kentucky, however, while admitting the general rule to be as above stated, holds it not to apply to the case at bar for the alleged reason that the section in question containing the limitation on defendant's powers was intended by the Legislature of Illinois to apply only to business done in Illinois and not to have extra territorial effect. And that court further suggests that the contention of defendant would have had a basis more favorable to it had such limitation been in a special charter and not in the statute creating the corporation.

We desire respectfully to call the attention of this court to certain facts concerning the constitutional pro-

visions, legislative acts and judicial decisions of the State of Illinois which in our opinion have a most important bearing upon the point now under consideration.

By the present Constitution of the State of Illinois, which was adopted in 1870, it is provided in Article XI, Section 1, as follows:

> "No corporation shall be created by special laws, or its charter extended, changed or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the State, but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."

Prior to the Constitution of 1870 two Constitutions had been adopted by that State; the first in 1818 and the second in 1848. The Constitution of 1818 contains no reference to the method of incorporating companies, and it needs no citation of authorities to show that in those early days corporations were generally incorporated by special acts of the Legislature.

The Constitution of Illinois of 1848 contains what purported to be a limitation upon the creation of corporations by special acts in Article X, Section 1, as follows:

> "Corporations not possessing banking powers or privileges may be formed under general laws, but shall not be created by special acts, except for municipal purposes, and in cases where, in the judgment of the General Assembly, the objects of the corporation can not be attained under general laws."

Under this Constitution of 1848, however, allowing incorporation by special act in the discretion of the Legislature, corporations continued to be formed by such special acts until it became a matter of great public concern and, as was said by the Supreme Court of Illinois in Johnson v. Joliet, etc., R. R. Co., 23 Ill. 124 (at page 129):

> "By the action of the General Assembly under this clause special acts have been so long the order of the day and the ruling passion of every Legislature which has convened under the Constitution until their acts of this description fill a huge and misshapen volume, and important and valuable rights claimed under them. The clause has been wholly disregarded, and it would now produce far-spread ruin to declare such acts unconstitutional and void."

At the time then of the adoption of the Constitution of 1870 public necessity existed for an effective rule, such as was then adopted, positively forbidding the granting of the old legislative charters and requiring all corporations to be organized under general laws. The wisdom of such regulation has been recognized generally, and most of the States have similar constitutional requirements. As stated by the Supreme Court of Illinois in Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 65 N. E. 451, 463:

> "Since the adoption of the Constitution of 1870 no corporation could be formed in this State under a special charter."

It follows then that the defendant corporation could not have a charter not founded upon a general statute

of Illinois providing for the incorporation of companies of like character in Illinois. Under this system of general laws in the incorporation of companies the recitation in a charter of certain powers not authorized by the statute itself avails nothing, as it has been held frequently that every power possessed by a corporation so incorporated must be traced to the statute and that the fact that a charter has passed the scrutiny of the Secretary of State and been certified by him as a part of the company's charter does not give to the corporation mentioned therein a power or privilege not included in or withheld by the general statute.

We are therefore brought back to the general law under which the defendant is incorporated for the ultimate measure of its powers and any limitations thereon imposed by the law of its creation.

THE RESTRICTIONS PLACED UPON A CORPORATION ORGANIZED IN THE STATE OF ILLINOIS FOLLOW THE CORPORATION INTO EVERY STATE IN WHICH IT ATTEMPTS TO TRANSACT BUSINESS.

We respectfully submit that it is not open to the objection made by the Supreme Court of Kentucky that the act in question was designed as a regulation of business in the State of Illinois only and should have no extra territorial effect. The opinion of the Kentucky Supreme Court points out in support of its decisions and as such proof that it was intended to operate only in the State of Illinois that the act "also provides how actions

against them (corporations organized under it) are to be tried." We respectfully submit there is no merit in this point. The only sections of the act referring to suits against the corporation organized under it are Sections 18, 19 and 20, and these deal exclusively with the supervision of such a corporation by the Auditor of Public Accounts or Insurance Superintendent and are to the effect that when the Auditor upon investigation shall be satisfied that any such company is insolvent or has exceeded its powers, has failed to comply with any provision of law, or is conducting business fraudulently, he shall apply to the Attorney-General to bring suit to restrain the company from continuing business. The procedure in such an action is outlined and it is provided that no order, judgment or decree providing for an accounting, or enjoining, restraining or interfering with the prosecution of the business of any such corporation shall be made or granted otherwise than upon the application of the Attorney-General, except in an action by a judgment creditor or in proceedings supplementary to execution. This is merely declaratory of the general rule of law that only the courts of the State creating a corporation shall have power to appoint a Receiver for it and close up its affairs.

The first three sections of the act in question provide the method of the incorporation of such companies. Sections 4 and 5 provide for the election of directors, managers and their control of the affairs of the corporation. Section 6 contains a provision for the reincorporation of then existing corporations. Section 7 defines the

character of companies to be organized under such act as assessment life insurance companies as corporations organized to insure lives, which provide for the payment of policy claims, the accumulation of reserve or emergency funds and the expense of the management and transaction of the business by payments to be made either at periods named in the contract or upon assessment as required, by persons holding similar contracts, and wherein the insured's liability to contribute to policy claims accrued or to accrue is not limited to a fixed sum. Section 8 refers to the accumulation of a reserve or emergency fund. Section 9 is the section herein pleaded, limiting such assessment associations to insure persons under sixty-five years of age, and providing in effect that the beneficiary or the person who receives the benefits of such membership shall in every case have an insurable interest in the life of the insured. Section 10 refers to annual reports of the Auditor of Public Accounts. Sections 11, 12 and 13 refer to accident insurance only. Section 14 refers to reports to and dealings with the Auditor of Public Accounts. Section 15 fixes a time limit for the payment of any contested claims. Section 16 provides a method of reinsurance. Sections 17, 18, 19 and 20 refer to reports to and supervision by the State Department. Sections 21 and 22 refer to the admission of foreign corporations. Section 23 provides a penalty for false statements by solicitors, agents, examining physician, applicant or other person. Section 24 gives the right to a member to change his beneficiary. Section 25 provides that the money or benefit under a policy shall

not be liable to attachment or garnishment. Sections 26 and 27 provide a penalty for a false statement by any officer or agent in any report or statement, or for refusing to permit the Auditor to make an examination of the company's condition and business, and also for fees of the Auditor. Section 28, the closing section of the act, repeals a prior act.

We submit that an examination of the act in question will show that it is confined strictly to the provisions necessary for the creation and existence of the special insurance association they are intended to create.

It may readily be conceived that the Legislature of a State may enact a statute which is intended to have application only within the State enacting it. An instance of this kind which has been before the courts is that certain statute of the State of New York commonly known as the "Non-Forfeiture Statute," which is in part as follows:

> "No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereafter issued or renewed * * * unless a written or printed notice, stating the amount of such premium, shall be duly addressed and mailed to the person whose life is insured," etc.

It was contended in another State that an insurance company organized in New York could not forfeite a policy in such other State without giving this notice. It was finally held that the statute in question plainly was intended to operate only within the State of New York, and in support of this opinion it was pointed out

that the contracts of both foreign and domestic corporations in New York were made subject to this law; that on the face of the statute there is no express demarcation between foreign and local companies; that from the language and intent to regulate the business of a foreign company outside of the State of New York could not be imputed and that neither could be found any such language or intent to prescribed limitations upon the contracts of New York companies outside the State. From these and other considerations it was held that the intent appeared that such limitation should apply only to business done by any company within the State of New York.

But the section of the Illinois Assessment Life Insurance Act here in question is of a different character. This limitation as to the character of those who may become beneficiaries in this particular assessment association is peculiar to this act among the different acts passed by the Legislature of Illinois authorizing insurance companies or associations, and it will appear that it was placed in the Assessment Act deliberately.

What is known as the General Life Insurance Act of Illinois contains no such limitation, the only provision of this nature being Section 18 of that Act, which is as follows:

> "No life insurance company organized under the laws of this State shall issue policies insuring fire or marine or accident or livestock risks, nor do any banking business."

The "Fraternal Insurance" Act of Illinois, adopted June 22, 1893, limits the payment of death benefits to

"the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member," with a condition that under certain conditions a charitable institution might be named beneficiary.

INSURABLE INTEREST, ASSESSMENT LIFE INSURANCE COMPANIES ALONE ARE PROHIBITED BY THE STATUTES OF ILLINOIS FROM ISSUING POLICIES IN FAVOR OF A BENEFICIARY WHO HAS NO INSURABLE INTEREST IN THE LIFE OF THE INSURED.

The Assessment Life Insurance Act under which defendant is incorporated stands alone in limiting directly the qualification of the beneficiaries to those having an insurable interest, and the intention of the Legislature to place this very limitation upon the particular class of insurance associations is evident from a review of the history of such associations and the judicial decisions upon the question of insurable interest of beneficiaries in Illinois.

Originally it seems to have been considered by most of the courts of the country that an insurable interest in the life insured was required in a beneficiary to support a valid contract of life insurance at common law. Many of the early decisions held therefore that in every valid life insurance contract the beneficiary must have an insurable interest in the life insured. This necessity for an insurable interest in the beneficiary was argued to be necessary as a matter of public policy, as otherwise the beneficiary would have a direct incentive to hasten the

death of the insured. In more recent decisions, however, the courts drew a distinction between those cases in which the insured took out the policy and paid the premiums and those cases in which the beneficiary took out and paid for the policy. In these latter cases it was considered and held that the reason for the rule existed only in those cases where the beneficiary took out and paid for the insurance, and that, on the other hand, where the insured himself procured the contract and paid the premiums, as the insured had an insurable interest in his own life he might make the benefit payable to whomsoever he pleased.

In 1 Cooley's Briefs on Insurance, page 245, it is said:

> "Whether insurable interest in the life insured was necessary to support a policy of life insurance at common law has been disputed. In view of the fact that prior to St. 14 Geo. III., c. 48, insurance without interest was common in England, it has been considered by some courts that interest was not necessary at common law. Such is the opinion expressed in Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576. (NOTE—Citing cases.) On the other hand, as early as 1815 interest was regarded as necessary even at common law in Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38, and this view seems to have met with approval in Loomis v. Eagle Life & Health Ins. Co., 6 Gray (Mass.), 376, and Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844. * * * In Ruse v. Mut. Ben. Life Ins. Co., 23 N. Y. 516, however, the court held that the statutes forbidding wager policies were merely declaratory of the common law and that an insurable interest was necessary at common law. The same view was subsequently taken in Ferguson v. Mass. Mut. Life Ins. Co., 22 Hun. (N. Y.) 320."

Further, at page 246, Volume 1, Cooley's Briefs on Insurance, the author says:

> "Whatever may have been the rule at common law, it is settled as a fundamental principle of American Law that one taking out a policy of insurance on the life of another person for his own benefit must have an interest in the continuance of the life insured." (Citing many cases)

Again on page 251 of the same volume, Mr. Cooley says:

> "In view of the reasons given, it may be laid down as an established principle that the rule requiring insurable interest in the life insured is based on considerations of public policy and that insurances without interest are void as contrary to public policy." (Citing Warnock v. Davis, 104 U. S. 75, and many other cases.)

Again on page 252 of 1 Cooley's Briefs on Insurance, the rule is stated as follows:

> "That one has an unlimited insurable interest in his own life as an elementary principle, as to the existence of which the cases are unanimous. (Citing many cases.) It follows, therefore, that one may take out a policy of insurance on his own life and make it payable to whom he will. It is not necessary that the person for whose benefit it is taken should have an insurable interest. This was regarded as unsettled in Valton v. Assur. Soc., 22 Barb. (N. Y.) 9. In Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282, it was said that, when the insurance is taken out by the person insured, no question of insurable interest can arise. The rule was finally established by the leading case of Campbell v. New England Mut. Life Ins. Co., 98 Mass. 381, and by Provi-

dent Life & Investment Co. v. Baum, 29 Ind. 236, and Hogle v. Guardian Life Ins. Co., 29 N. Y. Superior Court, 567, decided about the same time."

The writer cites a great number of authorities following this proposition.

This rule last above set forth, that an insurable interest was not necessary in the beneficiary where the policy was taken out by the insured, first came before the Supreme Court of Illinois in the year 1887, in the case of Bloomington Mut. Life Ben. Assn. v. Blue, 120 Ill. 121, 11 N. E. 331. In that case it was contended (1st) that Blue, the beneficiary, had no insurable interest in the life of Bailey, the insured, and hence the contract was void, and (2d) that the contract was void by virtue of the statute under which the defendant company was organized and doing business. As to the first point, the Supreme Court of Illinois, citing authorities from other States, held that as it did not appear that Blue had any instrumentality whatever in procuring the policy on the life of Bailey or in paying the premiums therefor, and that it did appear Bailey procured the policy and paid all the premiums, that an insurable interest in Blue, the beneficiary, was not necessary as Bailey had sufficient insurable interest in his own life and might appoint anyone to receive the money in case of his death.

As to the second point, the defendant in the Blue case was incorporated under an act, Section 1 of which was as follows:

"Be it enacted by the people of the State of Illinois represented in the General Assembly, that cor-

porations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs and relatives by consanguinity or affinity, devisees and legatees of deceased members, or accident or permanent disability indemnity to members thereof, and where members shall receive no money as profit, and where funds for the payment of such benefit shall be secured, in whole or in part, by assessment upon surviving members, may be organized, subject to the conditions hereinafter provided."

The court said:

> "It is contended that all persons not named in the act are prohibited from becoming beneficiaries. It will be observed that the contract involved is not absolutely prohibited by statute. All that can properly be claimed is that it was not expressly authorized by the statute."

And thereupon the court held the company estopped from raising the second defense, because it had received the premiums and the contract had been fully executed on the part of the insured.

We thus find in 1887 a declaration of two rules of law, the first, new to the court of Illinois, that an insurable interest was unnecessary in those cases where the policy was taken out and premium paid by the insured, and second, the rule that one might name as his beneficiary, one not belonging to the class or classes named in the statute as possible beneficiaries, provided the naming of such beneficiary was not "absolutely prohibited by the statute."

Up to this decision in the Blue case, and up to the enactment of the Assessment Life Insurance Act of 1893

here in question no statute existed in Illinois expressly forbidding the issuance of a policy or benefit certificate to a beneficiary without an insurable interest. But in this latter act passed in 1893, some six years after the decision of the Blue case, for the first time the Legislature adopted such a limitation and placed it in this assessment act. At the same session of the Legislature the present Fraternal Insurance Act of Illinois was adopted, and no such limitation was contained in that Fraternal Insurance Act.

It seems too clear for argument that the Legislature in providing for the incorporation and conduct of these assessment life insurance associations, which are purely co-operative mutual societies, deliberately placed this limitation upon the list of possible beneficiaries to make certain that only persons with an insurable interest should in any case receive the benefits of such a policy or membership certificate. They met and fully covered the two points made by the Blue case six years before and not only provided that the policy should be void in case the beneficiary had no insurable interest, by whomsoever the policy might be taken out, but went further and expressly prohibited the issuance of a policy to any person without an insurable interest. To emphasize their intention that the benefits of insurance in such associations should descend only to those with an insurable interest, and to prevent evasions of that rule, the Legislature in the same section expressly provided that an assignment of the policy to one without an insurable interest should be void.

The Legislature could hardly have spoken more clearly. This act in question provides, Section 7, that companies incorporated thereunder shall be governed only by the provisions of this particular act. This provision unmistakably applies only to and distinguishes these assessment companies or associations from all other insurance companies, associations and societies in the State of Illinois and plainly is deliberately planned and enacted as an additional assurance to the family and dependents of members of such companies or associations wherever they may reside. It can hardly be argued that the Legislature of Illinois expected or anticipated that these associations would confine their operations to the one State of Illinois in these days, and the conclusion seems to us irresistible that this Section 9 in question was intended to operate at all times as a limitation in favor of the families and dependents of all the members. In no other way would it, nor could it, preserve that equality which has been held to be the very life and essence of these mutual associations.

One other point in the opinion of the Supreme Court of Kentucky should be noted, where it is stated:

> "That this contract was valid under the laws of Kentucky was decided on the former appeal of this case."

This is an error. The answer of the defendant upon the first appeal did not contain any reference to the limitations on the powers of defendant here relied upon. In the original answer it was stated simply that the beneficiary had no insurable interest, and upon appeal the

Supreme Court decided that under the rule hereinbefore mentioned, as the complaint averred that the insured had taken out the policy and paid the premiums without the knowledge of the beneficiary, an insurable interest was unnecessary in the beneficiary. When the case was remanded, however, defendant filed its amended answer, setting up the statute of Illinois and the limitations referred to.

THE APPELLANT COMPANY IS NOT ESTOPPED FROM PLEADING THAT THE CONTRACT OF INSURANCE HEREIN WAS *ULTRA VIRES*.

In the case at bar, the general law, under which the insurance company was incorporated, *expressly forbids the issuance of the policies in question.*

We are, however, met with the argument that even if the insurance company did not have the power to issue the policies in question, having done so, the company is estopped from pleading its lack of power, and the contention is further made that the estoppel to plead "*ultra vires*" can be invoked here. That this is not the case, the following authorities clearly demonstrate.

In Mutual Guarantee Fire Insurance Co. v. Barker, 107 Iowa, 143 (on page 148), we find the following language:

> "The doctrine of '*ultra vires*' as applied to corporations is one of the most difficult with which the courts have to deal and the rules are not as definitely settled as we might wish. Were it not for the statute prohibiting mutual companies

organizing under Section 1160 from taking premiums and from doing business on the stock plan, we would be inclined to hold that, as the corporation had accepted and used the premium paid for the policy in suit, it should be estopped from pleading '*ultra vires*' as a defense. Indeed the modern authorities seem to maintan that rule (case cited). But where as in this case, *the act is prohibited by statute, the contract is illegal and void, and can not be enforced.*"

And the Supreme Court of the United States in Railway Companies v. Keokuk Bridge Co., 107 U. S. 371, in an opinion by Mr. Justice Gray, says:

"The reasons why a corporation is not liable upon a contract '*ultra vires*,' that is to say, beyond the powers conferred upon it by the Legislature and not varying from the objects of its creation, as declared in the law of its organization are: 1st. The interest of the public that the corporation shall not transcend the powers granted. 2d. The interest of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock. 3d. The obligation of every one entering into a contract with a corporation to take notice of the legal limits of its powers. These three reasons are clearly brought out in the unanimous judgment of the court delivered by Mr. Justice Campbell in the leading case of Pearce v. Madison & Indianapolis Railroad, 21 Howard, 441, in which it was held that a railroad corporation was not liable to be sued upon promissory notes which it had given in payment for a steamboat received and used by it and running in connection with its railroad.

"So it has been repeatedly adjudged by this court that a lease made by one railroad corporation

to another either of which is not expressly authorized by law to enter into the lease is '*ultra vires*' and void."

Thomas v. Railroad Co., 101 U. S. 71.
Pennsylvania Railroad v. St. Louis, etc., Railroad, 118 U. S. 290 and 630.
Oregon Railway v. Oregonian Railway, 130 U. S. 1.

Thus we see that a corporation can exercise no power save that expressly granted in its charter.

The Supreme Court of Illinois in the case of National Home Building & Loan Assn. v. Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, in holding a Building & Loan Association without power to purchase real estate in a certain case, cites from Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, as follows:

"All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts; and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

* * * * * * * * *

"The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation, as defined in the law of its organization, and therefore

beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisite to its existence or to its action, because such prerequisites might in fact have been complied with. But, when the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped by assenting to it or by acting upon it, to show that it was prohibited by those laws."

In the case of the issuance of the policies herein, not only was the power not granted but *the issuance was under the organic law of the corporation's creation specifically prohibited.*

In the case of Seattle Gas & Electric Co. v. Citizens Light & Power Co., 123 Fed. 588, Judge Hanford speaking for the court says:

"Corporations organized under Legislative Statutes are not endowed with the rights of natural persons to do as they please except when restrained by prohibitive laws. On the contrary, the rule is that they have only such powers and rights as the statutes confer and the enumeration of their powers implies the exclusion of all others except such subordinate

and incidental rights and powers as are essential to their existence and to the enjoyment and exercise of the rights and powers conferred in express terms and a corporation can make no contracts and do no acts either within or without the State which create it except such as are authorized by its charter. This is a proposition of elementary law so often repeated and reiterated in the decisions of the highest courts of the country that it is a matter of surprise to find that a large amount of capital has been invested by able men in the belief that the lawful powers of a corporation would expand by the mere extension of its operations into fields beyond the territorial boundaries of the State government to which its allegiance is due.

"More than sixty years ago Chief Justice Taney, in the opinion of the Supreme Court in Bank of Augusta v. Earle, 13 Peters, 519, 10 L. Ed. 274, after quoting from the opinion of Chief Justice Marshall in the case of Head & Armory v. Providence Insurance Company, 2 Cranch. 27, 2 L. Ed. 229, and in the Dartmouth College case, 4 Wheat. 636, 4 L. Ed. 629, and from the opinion of Justice Story in the case of Bank of U. S. v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552, said:

" 'It can not be necessary to add to these authorities. And it may be safely assumed that a corporation can make no contracts and do no acts, either within or without the State which creates it, except such as are authorized by its charter and these acts must also be done by such officers or agents and in such manner as the charter provides.'

"In the celebrated Dartmouth College case, Chief Justice Marshall said: 'A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being a mere creation of law, it possesses only those properties which the charter of its creation confers upon it either expressly or incidental to its very existence.' "

The Supreme Court of Missouri has also passed upon this question in State v. Tobacco Co., 75 Southwestern, 737, decided in 1903. The court cites (p. 746) the opinion of Chief Justice Waite in Relf v. Rundle, 103 U. S. 226, saying "No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers, while doing business away from its corporate home, but every person who deals with it elsewhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

Many of the State courts have seen fit to follow the reasoning in these cases and authorities innumerable might be cited in support of the position we are taking in this case, but we believe that the leading cases, above cited, are sufficient to establish the soundness of the principle involved.

The Court of Appeals of Kentucky has frequently affirmed this same doctrine.

In the case of Blitz & Co. v. Bank of Kentucky, etc., 21 Ky. L. Rptr. 1554, Judge Burnam on page 1556 says:

> "All corporations, whether public or private, derive their powers from legislative grant, and can not do any act for which authority is not expressly given,

> or which may not be reasonably inferred and a banking corporation being the creature of the statute, has only the power conferred by its charter."

This was a case in which a banking corporation attempted to carry on a business venture.

This doctrine was also upheld in the case of Murphy v. City of Louisville, 9 Bush, 189.

In the case of Jessamine County v. Swigert's Admr., and same against Newcomb-Buchanan Co., 8 K. L. R. 692, the court says:

> "In this country all corporations whether public or private derive their powers from legislative grant and can do no act for which authority is not expressly given or which may not be reasonably inferred."

In the case of Bell & Coggeshall Co., etc., v. Kentucky Glass Works, etc., 20 Ky. L. Rptr. 1089, it was held that a mortgage issued by a corporation to a bank for a greater amount than the amount of indebtedness permitted under its charter was void and that all persons dealing with a corporation were charged with notice of all the provisions of the charter.

And on page 1093 we find, in the Georgetown Water Co. v. Central Thompson-Houston Co., 17 Ky. Law Rep. 1270, it was substantially said:

> "Where the charter of a corporation provided that no contracts made by an officer of the company should be binding upon the company where the liability exceeded $250 unless sanctioned by a meeting of the stockholders representing two-thirds of the capital stock; a check of the company issued by the secretary and manager for more than $2,000 with-

out the consent of this two-thirds, was not binding upon the company. The charter of a corporation is a grant of its power, and those trading with its agents must take notice of the terms of the charter, and when an agent exceeds his power the corporate liability ends, and individual liability begins."

In Greene v. Middlesborough Town & Land Co., 89 S. W. 229, the Court of Appeals held that a corporation was not estopped to plead "*ultra vires*" when an act was done contrary to the powers of the corporation even though it had received monetary benefit from the act.

Syllabus: "While a corporation which, acting in excess of its powers, guarantees for a valuable consideration the stock of another corporation, must surrender the consideration which it has unlawfully obtained, yet the fact that it has received such consideration does not affect the illegal character of the guaranty, nor the availability of the defense of *ultra vires.*"

And at the bottom of page 230:

"It is said, however, that the contract has been performed on behalf of the plaintiff, and therefore that the defendant is estopped to deny its power to make it. We do not think that any such principle has application here. Strictly speaking, a corporation is never estopped to deny its power to make a contract where the extent of its powers, and of the fact relevant thereto were or should have been known to the parties seeking to enforce the contract when it was entered into. In cases where property has been received or money paid to the corporation seeking to avoid the obligation of an *ultra vires* contract, the person delivering the property or paying the money has the remedy of recovering back that which was given to the corporation on the faith of the

> *ultra vires* contract. This, however, as has been said several times by the Supreme Court of the United States, is not a recovery on the contract, but is, in effect, an avoiding of the contract, and a restoration of the parties to the '*status quo ante.*' "

It is true in these cases the Court of Appeals of Kentucky was deciding the validity of acts of corporations organized under the law of Kentucky, but as stated above the argument would not be sound that a corporation could have more power beyond the border of the State creating it than it has within the State.

The Court of Appeals held in Rupp v. Western Life Indemnity Company, 27 S. W. 490, 138 Ky. 18, that any beneficiary named could recover where the insured took out the policies upon his own life and made him beneficiary therein without his request or knowledge.

Granting this rule of law to be correct, the prohibition upon the Western Life Indemnity Company in its charter under the Illinois laws is:

> "No corporation doing business of life insurance under this act shall issue a certificate or policy upon the life of any person in which the beneficiary named has no insurable interest."

The petition in the case at bar states that the insured was the uncle of the plaintiff and beneficiary. No case, that we have been able to find, has held that a nephew has an insurable interest in the life of an uncle by reason of that relationship alone. The Court of Appeals may, therefore, be considered to have affirmed this doctrine in the opinion rendered in this case under formal appeal be-

cause many cases are cited therein where a recovery was denied because the relationship was not near enough to acquire a beneficial interest. If therefore the plaintiff, Clarence Rupp, as a nephew, had no insurable interest in the life of the insured at the time of the issuance of the policies, the law of the State of Illinois, incorporating the Western Life Indemnity Company rendered them void "*ab initio.*" And no act or series of acts can render a contract, void from the beginning, good.

The death of the insured has nothing to do with this. If the insured had lived twenty years, he could only have recovered the money paid.

We contend that the defendant has done all that it can legally do. It has tendered into court the amount paid or which should have been paid as premiums under the policies.

We realize the superficial force of the argument advanced in this case to the effect that the insurance company not only took the premiums and had the benefit of the same, but also issued the policy, bearing upon its face the facts upon which it now seeks to repudiate it.

The principles of the law we are invoking, however, are wider, weightier and deeper than any sentiment.

The officers of an insurance company are but the agents of the policyholders, whose money they hold and pay out for them. If a policy is paid, which should not be paid, the other policyholders have to make up that loss in premiums.

Fortified with the authorities cited herein, we ask that the judgment of the lower court be set aside; that

the service on the Insurance Commissioner be quashed; that it be adjudged that the policies were and are void, and that the administrator of the deceased policyholder, McCormick, recover the premiums paid on the policies with six per cent interest thereon.

Respectfully submitted,

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Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. [redacted] 50

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS, - - - Plaintiff in Error,

versus

CLARENCE RUPP, - - - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief and Argument for Defendant in Error.

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INDEX.

	PAGE
Statement of facts	1-8
The affidavits filed on motion to quash summons not made part of the record	8
The plaintiff in error is estopped from litigating the motion to quash the summons	9
Service on the insurance commissioner is service on plaintiff in error	9
It was the legislative intent that insurance companies doing business in this State should subject themselves to the law of the State	9
A corporate citizen leaving the State of its creation to transact business in other States may be required to respond personally to such method of service as the Legislature of the State may adopt	10
The construction placed on State statute by highest judicial tribunal is binding on the Federal Court,	10
Sections 631-657, Ky. Statutes are properly exercised or legislative authority	10
Plaintiff in error estopped from relying on plea *ultra vires*	11
No Federal question presented in this record	11
Statutes of the State do not have extra territory force	11

INDEX TO ARGUMENT ON FOLLOWING QUESTIONS.

PAGE

Argument as to affidavits not being part of the record 12-16

Plaintiff in error impliedly consented to service on insurance commissioner 17-19

Plaintiff in error entered its appearance by motion and objections in Circuit Court before motion to quash 19-20

Construction of State statute by highest judicial tribunal over State binding on Federal Court . . 21-22

Due process of law 22

Plaintiff in error is estopped from relying on plea of *ultra vires* 23-25

Illinois Statute has no extra territory of course . . . 25-27

No Federal question involved 27

AUTHORITIES CITED.

PAGE

Aetna Insurance Company v. Commonwealth, 116 Ky. 861 ..... 10, 22

Beach on Insurance, Sec. 861 24

Biglow on Estoppel, page 467 ..... 11, 25

Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457 24

Cross v. Allen, 141 U. S. 528 ..... 10, 22

Cyclone Mining Co. v. Baker Light and Power Co., 165 Federal Reporter, 997 18

Davidson v. New Orleans, 96 U. S. 104 ..... 11, 27

Dupoyster v. Fort Jefferson Improvement Co., 121 Ky. 518 15

Ency. of Law and Procedure, Vol. 23, page 1306 ..... 9, 10, 15, 19, 25

Evans v. Willis, 187 U. S. 271 10

Germania Insurance Company v. Ashby, 112 Ky. 306 ..... 9, 10

Greene-Bryce's *Ultra Vires*, pp. 721 and 729 ..... 11, 25

Hess, Admr., v. Segenfelter, etc., 127 Ky. 349 23

Home Benefit Society v. Muehl, 109 Ky. 479 ..... 9, 10

Illinois Life Ins. Co. v. Wortham, 119 S. W. 802 15

Johnson v. Postal Telegraph and Cable Co., 20 Ky. Law Rep. 1821 13

Kenton Insurance Co. v. Osborne, 21 Ky. Law Rep. 330 9

Layton v. Weed Southern Machine Co., 4 Ky. Law Rep. 263 13

Louisville Tob. Warehouse Co. v. Stewart, 24 Ky. Law Rep. 934 11

PAGE

L. & N. R. R. Co. v. Mazzone, 9 Ky. Law Rep. 151.... 13

May on Insurance, Sec. 729..... 24

Maysville & Big Sandy R. R. v. Ball, *et al.*, 108 Ky. 241 10

McDowell v. C., O. & S. W. R. R. Co., 90 Ky. 346.... 9

Mutual Life Ins. Co. of N. Y. v. Cohn, 179 U. S. 262.. 11

Prudential Life Ins. Co. v. Fusco's Admr., 145 Ky. 379 11

Royal Wheel Co. v. Dunbar, 25 Ky. Law Rep. 747.. 10

Runyons v. Bruchett, 135 Ky. 18.....8, 13

Rupp v. Western Life Indemnity Co., 138 Ky. 18....9, 23

Schwartz v. Christie, Grain & Stock Co., 166 Federal Reporter, 341 .....10, 19, 22

Skidmore, etc., v. C. W. Raymond, 144 Ky. 303.....8, 12

Smith v. Brannin, 79 Ky. 114..... 15

Stewart's Admr. v. L. & N., 136 Ky. 721.....9, 14

The Albin Company v. Commonwealth, 128 Ky. 295 .....11, 25

Underwood v. Newport Lyceum, 5th B. Monroe 129 .....11, 25

U. S. Fidelity & Guarantee Co. v. Blackley, Hirst & Co., 27 Ky. Law Rep. 392..... 15

Vance on Insurance, Sec. 49..... 24

Wall's Extr., etc., v. Demitt, 141 Ky. 716.....9, 15

Washington Life Ins. Co. v. Glore, 25 Ky. Law Rep. 1327 11

Waters, Pierce Oil Co. v. Texas, 177 U. S. 28.....10, 21

Western Life Indemnity Co. v. Rupp, 147 Ky. 489..9, 11

29 Am. and Eng. Ency., 2d Edition, *ultra vires*, page 50 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 333.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS, - - - - - - *Plaintiff in Error,*

versus

CLARENCE RUPP, - - - - - - *Defendant in Error.*

In Error to the Court of Appeals of the State of Kentucky.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

May it please the Court:

Previous to the 1st day of September, 1907, the plaintiff in error, the Western Life Indemnity Company, made application to the Insurance Commissioner of Kentucky for a permit to do business in Kentucky, as required by Section 657, Kentucky Statutes, which is as follows:

657. "**Foreign company to file charter and statement before doing business.** It shall not be lawful for any foreign life insurance company to transact any business in this State, by any agent or otherwise, unless it shall first file with the Insurance Commissioner a certified copy of its charter, articles of association or deed of settlement; a sworn annual statement of its condition as of the 31st of December of the year preceding, and also the certificate of the Superintendent or Commissioner of Insurance, or some chief financial officer of some other State, or of the United States, under his hand and official seal, that he holds on deposit, for the benefit of all policyholders of such company, stocks and securities amounting to at least one hundred thousand dollars, stating the kind, such as life insurance companies of this State are authorized to invest their capital stock in, or in which such companies are authorized to invest their capital stock or accumulated funds by the State in which the deposit has been made, or by the law of the United States; Provided, That any such company, not having such deposit made in the State in which it is organized, or with some officer of the United States, or in some other State, may make such deposit in this State, in the manner and subject to the provisions of law applicable to similar companies of this State."

Pending said application, it employed agents and took applications for life insurance in the State of Kentucky. On September 1, 1907, one George McCormick of 1462 High Avenue, Louisville, Ky., made application for two policies of one thousand dollars each with said Insurance Company. (Tr., pp. 46-51.) On the 7th day of September, 1907, policy No. 23870 was issued and delivered to said McCormick in the sum of one thousand dollars (p. 43). On the 20th day of September, 1907, policy No.

23892 for one thousand dollars was issued and delivered to said McCormick (p. 48). The application for each policy directed that the policies should be payable to Clarence Rupp, a nephew of the insured.

The insured died a resident of Louisville, Jefferson County, Ky., on the 18th day of October, 1907. Due notice of the death having been furnished the plaintiff in error on the 12th day of December, 1907, the company through its then president, George M. Moulton, by a letter directed to the beneficiary, Rupp, denied liability on the policies. Copy of the letters are filed with the petition in this action. On the 31st day of January, 1908, the defendant in error filed his petition in the Jefferson Circuit Court against the plaintiff in error, seeking to recover on said two policies. Summons was issued thereon to the Sheriff of Jefferson County and returned, "Not Found."

Afterwards on the 19th day of February, 1908, summons was issued directed to the Sheriff of Franklin County, the seat of the State Government. This summons was served on the Insurance Commissioner of the State (p. 5, Transcript). Said summons was authorized under Section 631, Kentucky Statutes, which is as follows:

> "Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the

company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit, or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

On the 21st of March, 1908, the action was regularly set at rules in the Jefferson Circuit Court, the exhibits referred to in the petition filed and the cause remanded to rules (p. 5, Transcript). On the 28th day of March, 1908, the action was again set at rules by the plaintiff. On the 28th day of March, 1908, the plaintiff by counsel moved the court for a judgment. The order with respect thereto is as follows:

"Came the plaintiff, by counsel, and moves the court for a judgment herein: To which the defendant objects.

"On motion of the defendant, by counsel, ordered that this action be and is assigned to April 1, 1908, at 9 o'clock a. m., for hearing on said motion (p. 6, Transcript)."

On the 1st day of April, 1908, the defendant by counsel moved the court to remand the action. This motion was overruled and the defendant excepted. Then the defendant by counsel moved the court for leave to withdraw its motion to remand, which motion was sustained by the court and the action was remanded (p. 6, Transcript).

After which, the defendant by counsel entered its special appearance and moved the court to quash the return on the summons. On the 2d day of April, 1908, the defendant by counsel filed the affidavit of its attorney, Pendleton Beckley, by which affidavit, the defendant sought to escape the effect of the entering of appearance by the objection to the judgment and motion that the case be assigned to April 1, 1908, at 9 o'clock, for a hearing thereon and also its motion to remand.

On the 4th day of April, 1908, defendant filed an affidavit of its attorney, Pendleton Beckley, in which among other things, it is shown that the plaintiff in error, the Western Life Indemnity Company, had applied to the Commissioner of Insurance of the State of Kentucky for a license to transact its business in accordance with the laws of the State of Kentucky and that said application was pending for some time and during which time the company in good faith intended to and was attempting to comply with the laws of the State of Kentucky and that the policies were issued about that time.

The affidavit of the President of the plaintiff in error was also filed at said time, which is substantially the same as that of counsel (pp. 8-9 and 10). Neither of these affidavits were made part of the record by order of court, nor was there a bill of exceptions filed making said affidavits or either of them parts of the record.

On the 30th of May, 1908, the defendant filed its answer in the first paragraph of which it attempted to plead to the jurisdiction of the court for want of service of process. The answer contained five separate para-

graphs (pp. 11 to 16 inclusive). Certain motions and demurrers were filed to said answer by defendant in error and on the 27th day of November, 1909, the Jefferson Circuit Court, Common Pleas Branch, Second Division, presided over by his Honor, Judge Gordon, in an opinion (pp. 19-20-21 and 22) ordered that the demurrer to the answer relate back to the petition and sustained the demurrer to the petition. The defendant in error declining to plead further, his petition was dismissed and he prosecuted an appeal to the Court of Appeals of Kentucky.

The Court of Appeals in an opinion written by Judge Nunn (pp. 25, 26, 27 and 28, Transcript), reversed the ruling of the lower court and remanded the action for further proceedings consistent with the opinion. Upon a return of the case to the Circuit Court, the defendant filed what is termed the second amended answer. This, however, we think was error, as the record contains but the original answer and the amendment herein referred to. The amendment is on pages 36-37-38 and 39, Transcript. In the amendment we find the following language:

> "The defendant, Western Life Indemnity Company, without waiving its plea to the jurisdiction of this court of the person of this defendant in this action, further answering, etc." (p. 36, Transcript), and again at the conclusion of the answer it reads as follows:
>
> "Defendant, Western Life Indemnity Company, with leave of court withdraws each and every allegation of the original answer and the first amended answer herein (p. 39, Transcript)."

The plaintiff filed a demurrer to the answer thus amended and the following order was entered by the Circuit Court thereon:

> "Came the defendant, by counsel and filed its second amended answer herein; then came the plaintiff, by counsel and filed a demurrer to the said answer as amended and the court being advised on said demurrer, sustains same with leave to the defendant to amend, to which the defendant excepts, and the defendant declining to further amend the said amended answer is dismissed; to which the defendant objects and excepts, *then the defendant by counsel withdrew all of its original first amended answer filed herewith, and elects to rely only upon the second amended answer this day filed*, to which a demurrer was this day sustained and this cause being submitted for judgment it is now adjudged by the court that the plaintiff Clarence Rupp recover of the defendant, Western Life Indemnity Company, the sum of $1,000.00 with interest thereon at the rate of six per cent per annum from the 31st day of January, 1908, until paid and the further sum of $1,000.00 with interest at the rate of six per cent per annum from the 31st day of January, 1908, until paid and his costs in this behalf expended, to all of which defendant objects and excepts and prays an appeal to the Court of Appeals, which is granted."

So by the order the defendant by counsel withdrew all of its original and the first amended answer and elected to rely on the second amended answer then filed, and, from this judgment the defendant prosecuted an appeal to the Court of Appeals of Kentucky and the same was affirmed by said court in an opinion written by Chief Justice Hobson (pp. 54 and 55).

In the petition for a writ of error but two questions are submitted for the determination of this court:

1st. "Service on the Insurance Commissioner of the State of Kentucky was not sufficient to bring said Insurance Company within the jurisdiction of the State court when the Insurance Company has not filed with the Commissioner a resolution adopted by its board of directors consenting that service of process might be had in that manner, as set forth in the statute authorizing such service.

2d. "The policies were issued by the Western Life Indemnity Company, a foreign insurance company, to a resident of Kentucky contrary to the organic law under which the insurance company was incorporated and the policies were therefore void and no recovery could be had thereon (p. 57, Transcript)."

BRIEF.

1. The affidavits filed on motion to quash the summons were not made a part of the record by order of court or bill of exceptions. The sufficiency of the summons and return were questions of fact and the affidavits filed on the motion to quash not having been made a part of the record, there is nothing in the record disclosing that said affidavits were all the evidence heard upon the motion. This being a question of fact can not be reviewed by the Higher Courts unless the record should contain all of the evidence heard.

Skidmore, etc., v. C. W. Raymond, 144 Ky. 303.
Runyons v. Bruchett, 135 Ky. 18.

2. The question as to whether the trial court correctly overruled the motion to quash the summons having been raised in the Circuit Court before the first appeal, it is now concluded by that opinion. It is the law of the case.

Rupp v. Western Life Indemnity Co., 138 Ky. 18.
Western Life Indemnity Co. v. Rupp, 147 Ky. 489.
Stewart's Admr. v. L. & N., 136 Ky. 721.
Wall's Extr., etc., v. Demitt, 141 Ky. 716.
McDowell v. C., O. & S. W. R. R. Co., 90 Ky. 346.
Ency. of Law and Procedure, Vol. 23, page 1306.

3. Service on the Insurance Commissioner is service upon an Insurance Company, although the company had ceased doing business in the State at the time of the service.

Home Benefit Society v. Muehl, 109 Ky. 479.
Kenton Insurance Co. v. Osborne, 21 Ky. Law Rep. 330.

4. It was the legislative intention in adopting Section 631, Kentucky Statutes that an Insurance Company organized in other States should not come into this State and do business and then leave the policyholder without redress under the Kentucky law and the policyholder had the right to assume that the company had complied with all the laws with respect thereto.

Germania Insurance Company v. Ashby, 112 Ky. 306.

5. When a corporate citizen of one State goes into another State for the purpose of transacting business it

may be required to respond personally to such method of service as the Legislature of said State may in its wisdom provide, so long as the method prescribed by the Legislature constitutes due process of law.

Schwartz v. Christie, Grain & Stock Co., 166 Federal Reporter, 341.

6. The construction placed on a State statute by the highest judicial tribunal of the State is binding on the Federal courts, if the service obtained in pursuance to the action constitutes due process of law or in other words does not violate the Federal Constitution.

Evans v. Willis, 187 U. S. 271.
Waters, Pierce Oil Co. v. Texas, 177 U. S. 28.
Cross v. Allen, 141 U. S. 528.

7. The plaintiff in error entered its appearance by its objection to the motion for judgment and motion to assign the action for hearing to April 1, 1908, as also by its motion to remand.

Royal Wheel Co. v. Dunbar, 25 Ky. Law Rep. 747.
Maysville and Big Sandy R. R. v. Ball, *et al.*, 108 Ky. 241.
Ency. of Law and Procedure, Vol. 3, pages 504-505.

8. Sections 631 and 657 of the Kentucky Statutes are a proper exercise of the legislative authority of the State.

Home Benefit Society v. Muhl, 22 Reporter, 1378.
Germania Insurance Company v. Ashby, 23 Ky. Reporter, 1654.
Aetna Insurance Company v. Commonwealth, 116 Ky. 861.

9. The plaintiff in error having accepted the premium and retained the same until after the death of the insured, it is now estopped from relying upon the plea of *ultra vires.*

The Albin Company v. Commonwealth, 128 Ky. 295.
Underwood v. Newport Lyceum, 5th B. Monroe, 129.
Biglow on Estoppel, page 467.
29 Am. and Eng. Ency., 2d Edition, *ultra vires,* page 50.
Greene-Bryce's *Ultra Vires,* pp. 721 and 729.
Louisville Tob. Warehouse Co. v. Stewart, 24 Ky. Law Rep. 934.

10. The statutes of a State do not have extra territorial force; they only regulate the insurance business in that particular State and can not be relied upon to defeat a policy in another State.

Washington Life Ins. Co. v. Glore, 25 Ky. Law Rep. 1327.
Prudential Life Ins. Co. v. Fusco's Admr., 145 Ky. 379.
Western Life Indemnity Co. v. Clarence Rupp, 147 Ky. 489.
Mutual Life Ins. Co. of N. Y. v. Cohn, 179 U. S. 262.

11. No Federal question is presented in this record.

Davidson v. New Orleans, 96 U. S. 104.

ARGUMENT.

THE AFFIDAVITS NOT HAVING BEEN MADE A PART OF THE RECORD BY ORDER OR BILL OF EXCEPTIONS CAN NOT BE CONSIDERED ON APPEAL.

We respectfully submit that the plaintiff in error having failed in the Circuit Court to have the affidavits of its president and attorney filed of record or made a part of the record by bill of exceptions that this court can not now consider said affidavits as a part of the record in this case, and, this being true, there is nothing in the record to support the motion to quash the return on the summons.

The Circuit Court certainly had jurisdiction of the subject-matter of the action, and, if plaintiff in error desired to present to the Circuit Court, any reason why the issual and service of the process did not give the Circuit Court jurisdiction of its person, then it must make the evidence, which it offers a part of the record either by order of court or bill of exceptions and, failing so to do, neither the Court of Appeals nor the Supreme Court of the United States can consider the evidence not so made a part of the record.

In Skidmore, *et al.*, v. C. W. Raymond & Co., 144 Ky. 303, appellants filed petition in the Powell County Circuit Court against appellees and caused summons to issue which was executed on one Currier as appellee's chief agent in said county. Appellee, without entering

its appearance, moved to quash and set aside the service of the summons on the ground that Currier was not its chief agent. This motion was sustained. The appellants declining to take further process, their petition was dismissed. They prosecuted an appeal to the Court of Appeals. The court said:

> "In the record before us certain affidavits are copied, but they are not made a part of the record by order of court or bill of exceptions; nor does the record show that the affidavits therein copied are all the affidavits that were read upon the hearing of the motion to quash, or that no other evidence was heard or considered by the court.
>
> "Where a question depending upon facts is brought before this court for review, the record itself should show that it contains all the evidence that was heard upon the motion. This can be done either by order of court or by bill of exceptions. The record before us fails to comply with this requirement. In the absence of such a showing, we must presume that the evidence adduced on the hearing of the motion was sufficient to justify the conclusion reached by the court. (Layton v. Weed Southern Machine Co., 4 Ky. Law Rep. 263; L. & N. R. R. Co. v. Mazzone, 9 Ky. Law Rep. 151; Johnson v. Postal Telegraph and Cable Co., 20 Ky. Law Rep. 1821; Runyons v. Bruchett, 135 Ky. 18.)"

In the case of Runyons v. Bruchett, 135 Ky. 18, instructions were copied in the record, but not made a part thereof by order of court or bill of exceptions; the court held they were not a part of the record and refused to consider them.

The first appeal to the Kentucky Court of Appeals was prosecuted by the plaintiff, now the defendant in

error, from the judgment of the State Circuit Court, dismissing the petition. Previous to the judgment of the Circuit Court dismissing the petition, the plaintiff in error had moved the Circuit Court to quash the summons. So it follows that when the action was first before the Kentucky Court of Appeals, the ruling of the Circuit Court in overruling the motion to quash the summons was before the Appellate Court and the plaintiff in error could and in fact, it was its duty to have the ruling of the Circuit Court in overruling its motion to quash the summons reviewed and passed upon by the Court of Appeals of Kentucky on that appeal, and, having failed so to do, it is now concluded by the opinion and judgment of the Court of Appeals, that opinion being the law of the case and the plaintiff in error is now estopped to further litigate that question.

As was said by the Kentucky Court of Appeals in Stewart's Admr. v. L. & N. R. R. Co., 136 Ky. 721:

> "The evidence given for the defendant which is now objected to is practically the same as that given for it on the former trial, and in the opinion on the former appeal none of it was condemned. That opinion is the law of the case, and matters which might have been brought to the attention of the court then, and were not, are concluded by that opinion. If errors are made on the trial against the appellee, and the case is brought here and reversed, he must call the attention of the court to the errors he wishes corrected; for the Circuit Court has a right to assume that matters not passed on in the opinion were correctly ruled on at the trial. Were it otherwise, litigation would be interminable, and an ap-

peal by one party would only be a stepping stone to another appeal by another."

The above quotation from the opinion in the Stewart case, *supra,* is copied into the opinion with approval by the Kentucky Court of Appeals in Wall's Extr. v. Demitt, 141 Ky. 716, and in which last-named action the Court quotes with approval from the case of the U. S. Fidelity and Guarantee Co. v. Blackley Hirst & Co., 27 Ky. Law Rep. 392, the following:

> "It is elementary that on the second appeal, the opinion on the first appeal must be treated as the law of the case, and all questions which were then presented and properly before the court are as conclusively settled, though not referred to in the opinion, as if each are specifically mentioned and considered. To the same effect is Illinois Life Ins. Co. v. Wortham, 119 S. W. 802; Smith v. Brannin, 79 Ky. 114; Dupoyster v. Fort Jefferson Improvement Co., officially reported in 121 Ky. 518, but cited by counsel for appellee as being in 89 S. W. 509."

In order to justify the opinion and judgment of the Court of Appeals of Kentucky, it was necessary that it did consider the summons and service thereon as good and sufficient to bring the person of the plaintiff in error before the Circuit Court, as this was essential to the proper adjudication of the matter before the court.

In the Ency. of Law and Procedure, Vol. 23, page 1306, the rule that we are contending for is very clearly announced as follows:

> "Matters which follow by necessary and inevitable interest from the judgment—findings or deter-

minations of the court in relation to the subject-matter of the suit, which are necessarily implied from its final decisions as being determinations, which it must have made in order to justify the judgment as rendered are equally covered by estoppel as if it were specifically found in so many words; or, in other words, it is allowable to reason back from the judgment to the basis on which it stands, and, regarding the judgment as a conclusion, and finding it to be one, which could have been drawn only from certain premises, the premises are equally *res judicata* with the conclusion itself. As an application of this rule a judgment authorizing a recovery on a written instrument necessarily involves an adjudication of its validity and due execution and so of a judgment foreclosing a mortgage Again, where a judgment which awards some portion of the relief demanded, or grants it as against some of the parties, silently dismisses or ignores the demand for other relief, it is a conclusive adjudication that such demand is not well founded."

From the authorities above cited, it appears that the plaintiff in error is now conclusively estopped from litigating the question as to the correctness of the issual or service of summons.

THE PLAINTIFF IN ERROR IMPLIEDLY CONSENTED THAT SERVICE ON INSURANCE COMMISSIONER WAS SERVICE ON IT.

It is contended, however, that the plaintiff in error had never complied with the Kentucky Statutes by consenting that a service of process upon any agent of the company in the State or upon the Insurance Commissioner should be a valid service upon the company. If

the affidavits on the motion to quash are not to be considered as a part of the record, then we have nothing in the record on which the plaintiff in error can base a claim that it was not before the court on the service of process.

However, if the affidavits are to be considered as a part of the record, then we have in this record by the affidavits alone this state of facts: that a foreign insurance company makes application to the Insurance Commissioner of Kentucky in compliance with a valid statute for permission to do business in Kentucky and as soon as the application is made and before all things may be done that were necessary to grant or reject the application, the applicant Insurance Company begins business in the State of Kentucky by writing policies on the lives of citizens therein, and, then by reason of its own conduct in withdrawing its application, attempts to place the persons to whom it has issued life insurance in a position that neither they, themselves, nor their beneficiaries may litigate any question arising with the Insurance Company in the courts of Kentucky, but must go to a foreign jurisdiction to litigate such questions.

It was the legislative intention in the adoption of the statutes, *supra*, that foreign insurance companies should not come into Kentucky and write insurance and leave the policyholder without redress under the Kentucky law; and such is the interpretation placed upon the statutes in question by the Court of Appeals in the case of Rupp v. Western Indemnity Company upon the first appeal, 138 Ky. 18, and also in Germania Insurance Company v. Ashby, 112 Ky. 306. When the plaintiff in error

made application to the Commissioner of Insurance in Kentucky to do business in Kentucky, it became subject to the laws of said State. Said Judge Wolverton, District Judge in Cyclone Mining Co. v. Baker Light and Power Co., 165 Federal Reporter, 997:

> "It has long been settled that by comity of nations and of the States, a corporation may be permitted to contract or to carry on any business in a State other than that of its creation, that it is authorized by its charter to transact at home, unless it be contrary to the laws or regulations of such other State. 'It has been said that a corporation must dwell in the place of its creation and can not migrate to another sovereignty.' It can not become a corporation or a citizen of any other sovereignty save that of its creation. If it does business in another State or sovereignty, it does so with the will or consent of the latter, either expressed or implied. By comity of the States as relates to the subject, is meant that implied assent by which a foreign corporation is permitted to carry on its business in States other than that of its creation. * * * A corporation may not transact business abroad, however, unless so permitted by comity or by some regulation of the statute of the foreign jurisdiction."

So in the instant case when the plaintiff in error made application to the Insurance Commissioner to do business in Kentucky, although it had not expressly consented to the service of process as in the statute required, yet there was an implied assent to the same, for when it began writing insurance in Kentucky, it then consented not only to avail itself of the law, but to subject itself to the laws of Kentucky with respect to the service of a

process, as stated by Judge Pollock, District Judge in Schwartz v. Christie, Grain and Stock Company, 166 Federal Reports, 338:

> "Therefore, as under the common law, there was no method by which a corporation of one State may be compelled to respond personally in the courts of a foreign State, yet as such foreign corporation may by legislative act be required to come personally before the courts of any State outside of that of its incorporation, into which it entered for the purpose of transacting its corporate business through officers or agents there located on such terms and conditions as the Legislature may prescribe, so long as such method constitutes due process of law, it follows of necessity the precise method adopted by the law-making power must be followed or no valid personal service is made and no jurisdiction is obtained."

PLAINTIFF IN ERROR ENTERED ITS APPEARANCE BY MOTION AND OBJECTIONS TO PROCEEDINGS IN THE CIRCUIT COURT BEFORE THE MOTION TO QUASH.

The plaintiff in error entered its appearance to this action when it objected to the motion for a judgment and moved the court to assign the case for action thereon and further when it entered its motion to remand, and this as fully as though it had filed an answer.

> "Any action on the part of the defendant, except to object to the jurisdiction of the court, which recognizes the case as in court, will amount to a general appearance." Ency. Law Procedure, Vol. 3, 504.

The motions above referred to were actions taken by the plaintiff in error previous to its objection to jurisdiction, and, certainly the motions made by it recognizes the case as in court and thereby its general appearance was entered.

There is nothing in this record to disclose whether the plaintiff in error had any agent in Kentucky other than the Commissioner of Insurance on whom process could be served.

SERVICE ON THE INSURANCE COMMISSIONER WAS SERVICE ON PLAINTIFF IN ERROR.

Sections 631 and 657 of the Kentucky Statutes, being well within the constitutional limitations of the Legislature, and the plaintiff in error having attempted through the Statutes to obtain the privilege of transacting business in Kentucky, stands in the same attitude as an insurance company that had been granted the privilege by the Insurance Company and afterwards ceased doing business in the State; therefore the service of process on the Insurance Commissioner was a service on the plaintiff in error. In other words, the agency of the Insurance Commissioner continues after the company withdraws business in the State, at least, in so far as it affects contracts theretofore entered into, and the Court of Appeals of Kentucky so held in the Home Benefit Society v. Muehl, 109 Ky. 479; Kenton Insurance Company v. Osborne, 21 Ky. Law Reporter, 530.

CONSTRUCTION OF THE STATE STATUTES BY THE HIGHEST JUDICIAL TRIBUNAL OF STATE IS BINDING ON THE FEDERAL COURTS.

It has ever been the rule in the Supreme Court of the United States to give that construction to the State Statutes that is given to the same by the highest judicial tribunals of the State in common law proceedings, provided there is no Federal question or questions affecting the Constitution of the United States involved. Therefore, the construction placed on Sections 631 and 657 of the Kentucky Statutes by the Appellate Court of Kentucky are binding on this court, and such decisions will be regarded by this court as controlling. It was so held by this court in Evans v. Nellis, 187 U. S. 271.

Waters, Pierce Oil Co. v. Texas, 177 U. S. 28.

> "The decision of the highest court of a State upon questions wholly of constitutional law arising under the Constitution of that State binds the United States Courts; and the construction of the State Statutes, or a determination as to the validity of their enactments or of their constitutionality by such courts constitutes a rule of decision for the Federal courts, provided no Federal question, or Federal questions, or contract right or question affecting the Constitution of the United States is involved." * * * 11th Ency. Law Procedure, 897.

Decisions of the State court, if binding, will be presumed to be based upon a thorough consideration of

questions involved and a suggestion *contra* will not be entertained.

Cross v. Allen, 141 U. S. 528.

It was the legislative intention in adopting Sections 631 and 637 of the Kentucky Statutes that insurance companies organized in other States should not come into this State and write insurance and then by withdrawing from the State leave the policyholder without redress under the Kentucky law and every policyholder has the right to assume that the company had complied with all the laws with respect thereto; such construction was so placed upon said statute by the highest judicial tribunal in Kentucky in the Germania Insurance Company v. Ashby, 112 Ky 306.

DUE PROCESS OF LAW.

The methods prescribed by the legislative department of the State of Kentucky are a reasonable and proper exercise of the legislative authority, and, when it provides that the Insurance Commissioner shall be the agent of a foreign insurance company for the service of process where the company has been transacting business in the State, it constitutes due process of law.

Schwartz v. Christie Grain & Stock Company, 166 Federal Reporter, 341.

Aetna Insurance Company v. Commonwealth, 116 Ky. 861.

THE PLAINTIFF IN ERROR IS ESTOPPED FROM RELYING UPON THE PLEA OF *ULTRA VIRES*.

The policies of insurance issued by the plaintiff in error are not entirely and obviously outside of its granted powers, but are within the general scope of the power granted to it and if there were any limitations upon its power by charter or legislative act of the State of Illinois, such limitation was unknown to the insured, McCormick.

The business engaged in by the plaintiff in error was that of doing a general life insurance business and while the Statutes of Illinois provide that an Insurance Company created under the Illinois Statute shall not issue a policy upon the life of one person payable to another who has no insurable interest in the life of such person, we must construe that statute with respect to the generally accepted doctrine of this Court and the highest Courts of all the States of the Union, and, that is, that the insured may take out a policy and pay the premium and make the policy payable to whomsoever he desires, in which character of case the policy and contract does not come within the rule making same void, because contrary to public policy.

As said by the Court of Appeals of Kentucky in Hess, Admr., v. Segenfelter, etc., 127 Ky. 349, and quoted with approval in Rupp v. Western Life Indemnity Co., 138 Ky. 18:

> "All the courts of last resort, with possibly one exception, and the text-writers on insurance generally, are agreed that a person may take out insurance upon his own life and designate whom he pleases as

the beneficiary. This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction and not in the continuance of his own life."

In support of this position numerous authorities are referred to including Vance on Insurance, Sec. 49:

May on Insurance, Sec. 112.
Bacon on Insurance, Sec. 729.
Beach on Insurance, Sec. 861.
Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457.

The insured, having procured the policy and paid the premiums himself and caused the policy to be made payable to his nephew, the defendant in error; the contract is not condemned by the law, and, such a policy we doubt not was never intended to be condemned by the Statute of Illinois. Yet, if it was so intended, when the plaintiff in error left Illinois to transact business in Kentucky, it did so with an implied consent upon its part that it would subscribe to all of the laws and regulations of Kentucky with respect to life insurance and therefore, it can not now avail itself of the plea of *ultra vires*, especially in view of the fact that the enforcement of the contract is required that justice may be done.

The presumption was that it was well within the scope of its power and authority when it entered into the contracts in question:

"A general presumption of right acting attends corporations, the effect of which is to place the burden of proving that a contract made or an act done by a corporation was *ultra vires* upon him who alleges that fact as a foundation of his action or defense."

Ency. of Law and Procedure, Vol. 10, p. 1155.

"The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."

Ency. of Law and Procedure, Vol. 10, p. 1160.
The Albin Co. v. Commonwealth, 128 Ky. 295.
Underwood v. Newport Lyceum, 5th B. Monroe, 129.
Biglow on Estoppel, page 467.
Greene-Bryce's *Ultra Vires*, pp. 721 and 729.

THE STATUTE OF ILLINOIS RELIED ON BY THE PLAINTIFF IN ERROR HAVE NO EXTRA TERRITORIAL FORCE.

The contracts of insurance sued on in this action were made and entered into and to be performed in Kentucky. It is almost a universal practice of Insurance Companies to issue policies at the home office in another State and to send them to this State for delivery and such was the fact in the instant case, and, therefore, it being a Kentucky contract, the Statute of Illinois does not control the same. There is no reference to the Statute of Illinois in the policy sued on and nothing therein to show that

the parties had in contemplation the Illinois Statute when the contracts were entered into.

The Kentucky Court of Appeals in its last opinion in the instant case, 147 Ky. 489, in reference to the Illinois Statute say:

> "We have examined the act with care and find that it not only contains a scheme for the incorporation of these companies and their management and supervision by the State, but also provides how actions against them are to be tried. To whom a policy of insurance may be assigned when the policy has been issued in Kentucky and the assignment is made in Kentucky may be regulated by the laws of Kentucky. The statutes of one State ordinarily have no operation in another State. It is true that a corporation formed under the laws of one State has only the powers conferred upon it in the State of its origin, but when a foreign corporation is permitted by another State to come within it and make contracts, the State which thus gives its permission may regulate the validity of the contracts thus made. Upon an inspection of the whole act we are satisfied that the section above quoted was not intended by the Legislature of Illinois to have an extra territorial effect. It was only intended to regulate the business done in Illinois. The act is a general one governing this character of business and evidently refers to business done in Illinois. When a company comes to Kentucky and issues policies in Kentucky, the validity of these Kentucky contracts must be determined by the laws of Kentucky under which the contracts were made. That this contract was valid under the laws of Kentucky was decided on the former appeal of this case."

The same principle was announced by the Kentucky Court of Appeals in Washington Life Insurance Com-

pany v. Glover, 25 Ky. Law Rep. 1327. In that case it appears that the New York Statute was printed on the back of the policy, but that it did not purport to have any extra territorial force.

In the case of the Mutual Life Insurance Company of New York v. Cohen, 179 U. S. 262, the court said, with respect to the Statute of New York that the law of the State where the contract was to be performed should prevail. The presumption is in favor of the law of the place of the contract.

It appears to be clear that the Illinois Statute relied on was enacted only for the government of Insurance Companies in the State of Illinois and could have no application to a policy written by an Illinois corporation in another State.

NO FEDERAL QUESTION INVOLVED.

Every question presented on this appeal was presented and determined by the Appellate Court of Kentucky, and it appears that the plaintiff in error may well come under the head of litigants as described by this Court in the case of Davidson v. New Orleans, 96 U. S., p. 104:

> "But while it has been part of the Constitution as a restraint upon the power of States, only a very few years the docket of this court is crowded with cases in which we are asked to hold that State courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some substantial misconception of the

scope of this provision as found in the Fourteenth Amendment, in fact it would seem from the character of the cases before us and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him; and of the merits of the legislation on which such a decision may be found."

Under the authorities herein cited, we respectfully ask that the judgment of the lower court be affirmed.

J. M. CHILTON,
JAS. P. EDWARDS,
CHAS. F. OGDEN,
R. F. PEAK,
Attorneys for Defendant in Error.

WESTERN LIFE INDEMNITY COMPANY OF ILLINOIS *v.* RUPP.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 50. Submitted November 5, 1914.—Decided November 30, 1914.

A State may prescribe that a voluntary special appearance in one of its courts, even for the purpose of objecting to the jurisdiction, shall be deemed a general appearance, without violating the due process clause of the Fourteenth Amendment.

In the Federal courts a defendant may appear specially to insist upon the illegality of service, and if overruled does not waive his objections by answering to the merits, *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, but the States may, as Kentucky has, establish a different rule, and nothing in the Fourteenth Amendment prevents them from so doing.

The due process provision of the Fourteenth Amendment has regard not to matters of form but to substance of right.

While there is a rule in Kentucky that appearance in the appellate court operates as a submission to the jurisdiction so as to dispense with service of process, the rights of the defendant in a case where plaintiff appeals are safeguarded by his right to a cross-appeal on this or any other objection.

While a non-resident, against whom a personal action is instituted in a state court without personal service within the jurisdiction, may ignore the proceeding as wholly ineffective and set up its invalidity when an attempt is made to take his property thereunder, if he wishes to contest the validity of the proceeding in advance in the courts of the State he must enter the courts subject to the rules as to submitting to the jurisdiction.

It is not unreasonable for a State to prescribe such rules of procedure in regard to special appearances in its courts as will prevent a defendant from attempting to obtain a binding adjudication on the merits in his favor through the exercise of the court's jurisdiction, while depriving the plaintiff of the possibility of success by reserving an objection to the jurisdiction of the court.

Where, in a state court, the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the full faith and credit clause of the Federal Constitution.

The Kentucky court, having recognized the existence, validity and relevancy of a statute of Illinois prohibiting an insurance company from issuing a policy of insurance upon a life in which the beneficiary has no insurable interest, but having, in the absence of any decision of the courts of Illinois placing a different construction thereon, construed the statute as not having any extra-territorial effect or any application to business done in Kentucky, there was no refusal to give the Illinois statute the full faith and credit required by the Federal Constitution.

If a party setting up a statute of one State in a court of another State intends to rely upon an authoritative judicial construction of the statute in the State of its origin, it is incumbent upon him to prove it as a matter of fact.

The rule that what is matter of fact in the state court is matter of fact in this court upon review, applies where foreign law is in question in the state court as well as to any other issue of fact.

If the state court has not denied full faith and credit to the statute of another State, this court has not jurisdiction to determine whether the interpretation given to such statute is or is not erroneous.

147 Kentucky, 489, affirmed.

THE facts, which involve the validity of a judgment based on substituted service, and the validity under the Fourteenth Amendment of the practice of the Kentucky courts in regard to special appearances and also ques-

tions arising under the full faith and credit clause of the Federal Constituion, are stated in the opinion.

Mr. Henry Burnett, Mr. Pendleton Beckley, Mr. H. W. Batson, Mr. Graddy Cary, Mr. Thomas J. Graydon and *Mr. John M. Scott* for plaintiff in error:

A foreign insurance company sued in a state court of Kentucky cannot lawfully be summoned by a substituted service on the State Insurance Commissioner, unless it has been licensed to do business in the State, and has assented to such substituted service. § 631, Ky. Stats.; *Hunter* v. *Mutual Ins. Co.*, 218 U. S. 573; *Mutual Ins. Co.* v. *Phelps*, 190 U. S. 147.

Illegality in the service of process by which jurisdiction is to be obtained, is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Such illegality is considered as waived, only when he, without having insisted upon it, pleads in the first instance to the merits. *Harkness* v. *Hyde*, 98 U. S. 476.

A corporation doing business in a foreign State can exercise in that State only such powers as are granted to it by the laws of the State in which it is organized. Story on Conflict of Laws, 175 (note); 3 Clark & Marshall on Priv. Corp., § 840; 5 Thompson on Corps., 2d Ed., § 6627; *Canada Southern Ry.* v. *Gebhard*, 109 U. S. 527; *Pierce* v. *Crompton*, 13 R. I. 312; *Harris Lumber Co.* v. *Coffin*, 179 Fed. Rep. 257; *Scott* v. *Stockholders Oil Co.*, 142 Fed. Rep. 287; *Bucki Lumber Co.* v. *Atlantic Lumber Co.*, 128 Fed. Rep. 332; *Michigan State Bank* v. *Gardner*, 15 Gray, 362; *Rue* v. *Mo. Pac. Ry.*, 8 S. W. Rep. 533; *Manhattan Life Ins. Co.* v. *Field*, 26 S. W. Rep. 280; *Oregon Railway* v. *Oregonian Ry.*, 130 U. S. 1; *State* v. *Southern Pac. Co.*, 28 So. Rep. 372; *Nathan* v. *Lee*, 52 N. E. Rep. 987; *Thomas* v. *Railroad Co.*, 101 U. S. 71.

The present constitution of the State of Illinois, adopted

in 1870, provides that no corporation shall be created by special laws. Art. 11, § 1; *Chicago Traction Co.* v. *Chicago*, 199 Illinois, 484.

The restrictions placed upon a corporation organized in the State of Illinois follow the corporation into every State in which it attempts to transact business. Section 9, Illinois Assessment Ins. Co. Act, appr'd, June 22, 1893; Story on Conflict of Laws, p. 175 (note); 3 Clark & Marshall, Priv. Corps., § 840; *Pierce* v. *Crompton*, 13 R. I. 312; *State* v. *So. Pacific Co.*, 28 So. Rep. 372.

Assessment life insurance companies alone are prohibited by the statutes of Illinois from issuing policies in favor of a beneficiary who has no insurable interest in the life of the insured. Section 9, *supra;* 1 Cooley's Briefs on Insurance, pp. 245–252; *Bloomington Mutual Assn.* v. *Blue*, 120 Illinois, 121.

The appellant company is not estopped from pleading that the contract of insurance herein was *ultra vires*. *Mutual Ins. Co.* v. *Barker*, 107 Iowa, 143; *National Building Association* v. *Home Savings Bank*, 181 Illinois, 35; *Central Trans. Co.* v. *Pullman Car Co.*, 139 U. S. 24; *Seattle Gas Co.* v. *Citizens Light Co.*, 123 Fed. Rep. 588; *State* v. *Tobacco Co.*, 75 S. W. Rep. 737; *Relph* v. *Rundle*, 103 U. S. 226; *Blitz* v. *Bank of Kentucky*, 21 Ky. Law Rep. 1554; *Murphy* v. *Louisville*, 9 Bush (Ky.), 189; *Jessamine County* v. *Newcomb Buchanan Co.*, 8 Ky. Law Rep. 692; *Bell & Coggeshall* v. *Kentucky Glass Works*, 20 Ky. Law Rep. 1089; *Georgetown Water Co.* v. *Central Thompson-Houston Co.*, 17 Ky. Law Rep. 1270; *Green* v. *Middlesborough Town Co.*, 89 S. W. Rep. 229.

Mr. J. M. Chilton, *Mr. James P. Edwards*, *Mr. Charles F. Ogden* and *Mr. R. F. Peak* for defendant in error:

The affidavits filed on motion to quash the summons were not made a part of the record by order of court or bill of exceptions. The sufficiency of the summons and

return were questions of fact and the affidavits filed on the motion to quash not having been made a part of the record, there is nothing in the record disclosing that said affidavits were all the evidence heard upon the motion. This being a question of fact cannot be reviewed by the higher courts unless the record should contain all of the evidence heard. *Skidmore* v. *Raymond*, 144 Kentucky, 303; *Runyons* v. *Bruchett*, 135 Kentucky, 18.

The question as to whether the trial court correctly overruled the motion to quash the summons having been raised in the Circuit Court before the first appeal, it is now concluded by that opinion. It is the law of the case. *Rupp* v. *Western Life Co.*, 138 Kentucky, 18; *Western Life Co.* v. *Rupp*, 147 Kentucky, 489; *Stewart* v. *Louis. & Nash. R. R.*, 136 Kentucky, 721; *Wall &c.* v. *Demitt*, 141 Kentucky, 716; *McDowell* v. *C., O. & S. W. R. R.*, 90 Kentucky, 346; 23 Ency. of Law & Proc., p. 1306.

Service on the insurance commissioner is service upon an insurance company, although the company had ceased doing business in the State at the time of the service. *Home Benefit Society* v. *Muehl*, 109 Kentucky, 479; *Kenton Ins. Co.* v. *Osborne*, 21 Ky. Law Rep. 330.

It was the legislative intention in adopting § 631, that an insurance company organized in other States should not come into this State and do business and then leave the policyholder without redress under the Kentucky law and the policyholder had the right to assume that the company had complied with all the laws with respect thereto. *Germania Ins. Co.* v. *Ashby*, 112 Kentucky, 306.

When a corporate citizen of one State goes into another State for the purpose of transacting business it may be required to respond personally to such method of service as the legislature of said State may in its wisdom provide, so long as the method prescribed by the legislature constitutes due process of law. *Schwartz* v. *Christie Grain Co.*, 166 Fed. Rep. 341.

The construction placed on a state statute by the highest judicial tribunal of the State is binding on the Federal courts, if the service obtained in pursuance to the action constitutes due process of law or in other words does not violate the Federal Constitution. *Evans* v. *Willis*, 187 U. S. 271; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Cross* v. *Allen*, 141 U. S. 528.

The plaintiff in error entered its appearance by its objection to the motion for judgment and motion to assign the action for hearing to April 1, 1908, as also by its motion to remand. *Royal Wheel Co.* v. *Dunbar*, 25 Ky. Law Rep. 747; *Maysville and Big Sandy R. R.* v. *Ball*, 108 Kentucky, 241; 3 Ency. of Law & Proc. 504.

Sections 631 and 657 of the Kentucky Statutes are a proper exercise of the legislative authority of the State. *Home Benefit Society* v. *Muhl*, 22 Ky. Law Rep., 1378; *Germania Ins. Co.* v. *Ashby*, 23 Ky. Law Rep. 1654; *Ætna Ins. Co.* v. *Commonwealth*, 116 Kentucky, 861.

Plaintiff in error having accepted the premium and retained the same until after the death of the insured, it is now estopped from relying upon the plea of *ultra vires*. *Albin Co.* v. *Commonwealth*, 128 Kentucky, 295; *Underwood* v. *Newport Lyceum*, 5 B. Mon. 129; Bigelow on Estoppel, 467; 29 Am. & Eng. Ency., 2d ed., *ultra vires*, p. 50; Greene-Bryce's *Ultra Vires*, pp. 721, 729; *Louisville Warehouse Co.* v. *Stewart*, 24 Ky. Law Rep. 934.

The statutes of a State do not have extraterritorial force; they only regulate the insurance business in that particular State and cannot be relied upon to defeat a policy in another State. *Washington Life Ins. Co.* v. *Glore*, 25 Ky. Law Rep. 1327; *Prudential Life Ins. Co.* v. *Fusco's Admr.*, 145 Kentucky, 379; *Mutual Life Ins. Co.* v. *Cohn*, 179 U. S. 262.

No Federal question is presented in this record. *Davidson* v. *New Orleans*, 96 U. S. 104.

MR. JUSTICE PITNEY delivered the opinion of the court.

In September, 1907, plaintiff in error, an Illinois corporation organized under the general laws of that State applicable to life insurance, issued to one George McCormick, a resident of Louisville, Kentucky, two policies, each insuring his life in the sum of $1,000, for the benefit of his nephew, Clarence Rupp, if living, otherwise for the benefit of the executors of the insured. After the death of the insured, which occurred in the same year, the present action was brought by Rupp against the Company in the Jefferson Circuit Court at Louisville. His petition set forth his relationship to the insured, and beyond this showed no insurable interest. It averred that the policies were issued upon McCormick's application, who also paid the premiums thereon, and this without plaintiff's instance, request or knowledge. The summons was served upon the Insurance Commissioner of the State. Section 631, Kentucky Statutes, 1909, provides: "Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office."

The defendant Company made a special appearance to the action and moved the court to quash the return upon the summons on the ground that it was a corporation organized and existing under the laws of the State of Illinois; that at the time the policies in question were issued it had applied to the Superintendent of Insurance of the State of Kentucky for a license to transact business in that State,

and in case such license was issued to appoint said Superintendent of Insurance its agent for service of process; that the application for license was pending for some time, and that it was during this time that the policies sued on were issued, but that the application for license was afterwards rejected by the insurance department of the State; that the Company never appointed the Superintendent of Insurance its agent for service of process, and never consented that he might be served with or accept such service on the Company's behalf.

The motion was overruled, and the company thereafter filed an answer in which, without waiving its objection to the jurisdiction of the court over it, but reiterating that objection, it set up sundry defenses upon the merits, including an allegation of fraudulent representations in the application pursuant to which the policies were issued, and a denial that the plaintiff had an insurable interest in McCormick's life. To certain paragraphs of this answer plaintiff demurred, and the Circuit Court, upon the ground that this demurrer rendered it proper and necessary to determine the sufficiency of plaintiff's petition, reviewed that pleading, and reached the conclusion that by the law of Kentucky the relationship of uncle and nephew did not constitute an insurable interest, that one who could not take out a policy because of lack of interest could not hold it if assigned to him after its issuance, and that the same rule prevented a person from taking out a policy of insurance upon his own life in favor of another having no insurable interest. Therefore the court sustained the demurrer as against the petition, and, plaintiff having declined to plead further, judgment was rendered in favor of defendant.

Plaintiff appealed to the Court of Appeals, which held (138 Kentucky, 18) that while according to the law of Kentucky one who obtains a policy of insurance upon the life of another must have an insurable interest in that life,

it is otherwise with respect to a policy taken out by a person upon his own life, he paying the premium for the benefit of another having no insurable interest, and that such a policy is not a wagering transaction but is valid. The judgment of the Circuit Court was therefore reversed and the cause remanded for further proceedings. Thereafter defendant filed a "second amended answer" in the Circuit Court, withdrawing by the court's leave "each and every allegation of the original answer and the first amended answer herein," and—"without waiving its plea to the jurisdiction of this court of the person of this defendant in this action"—set up that defendant was a corporation organized and incorporated under an act of the Legislature of the State of Illinois approved June 22, 1893, entitled "An Act to incorporate companies to do the business of life or accident insurance on the assessment plan, and to control such companies of this State and of other States doing business in this State," etc., which contains in § 9 the following: "No corporation doing business of life insurance under this act shall issue a certificate or policy upon . . . a life in which the beneficiary named has no insurable interest. Any assignment of the policy or certificate to a person having no insurable interest in the insured life shall render such a policy or certificate void." It was further averred that under this act defendant had no power to issue any policy of insurance upon the life of any person in which the beneficiary named had no insurable interest; that the plaintiff Rupp was the nephew of the insured McCormick; that Rupp had no insurable interest by virtue of such relationship or otherwise in the life of the insured, and that the policies sued on were null and void. There was a tender of the amount of the premiums paid and a denial of further liability. The answer invoked the "full faith and credit" clause of the Federal Constitution, averring that to compel defendant to pay the policies

sued on would be a failure upon the part of the State of Kentucky to give full faith and credit to the act of the Legislature of the State of Illinois.

To this answer plaintiff demurred, and the Circuit Court sustained the demurrer, with leave to amend the answer. Defendant declined to further amend, and elected to rely only upon the answer to which the demurrer had been sustained. Judgment having been thereupon rendered in favor of plaintiff for the amount of the two policies with interest, defendant prosecuted its appeal to the Court of Appeals, and to review the decision of that court affirming the judgment (147 Kentucky, 489), the present writ of error is sued out.

There are two Federal questions. The first is raised by the contention that under the Kentucky statute already quoted a foreign insurance company sued in a state court cannot lawfully be summoned by a substituted service upon the state Insurance Commissioner unless the company has been licensed to do business in the State and has by resolution of its board of directors assented to such substituted service; and that to sustain a judgment rendered in the absence of such service is violative of the "due process" clause of the Fourteenth Amendment. To this contention the Court of Appeals responded thus (147 Kentucky, 489, 490): "It is too late now to raise the question that the process was not properly served. This question should have been presented on the first appeal. On that appeal the case was heard here on the merits, and it is too late after a reversal on the merits to raise any question as to the sufficiency of the process." Citing *McDowell* v. *Chesapeake, Ohio &c. R. R. Co.*, 90 Kentucky, 346, and *Illinois Central R. R. Co.* v. *Glover*, 24 Ky. Law Rep. 1447, 71 S. W. Rep. 630. That it is and long has been the practice of the courts of Kentucky to treat the appearance of a party in the appellate court as a submission to the jurisdiction so as to dispense with the

service of process in the court below, and that this rule is applied even where a judgment against the defendant is reversed because of a defect in process, will appear from an examination of the cases. *Grace* v. *Taylor*, 1 Bibb, 430; *Graves* v. *Hughes*, 4 Bibb, 84; *Wharton* v. *Clay*, 4 Bibb, 167; *Bradford* v. *Gillespie*, 8 Dana, 67, 68; *Salter* v. *Dunn*, 64 Kentucky (1 Bush), 311, 317; *Chesapeake, Ohio &c. R. R. Co.* v. *Heath*, 87 Kentucky, 651, 660.

It is contended that where, as here, the first appeal is prosecuted by plaintiff, the defendant's objection to the jurisdiction of the trial court over its person is not thereby waived, because no other question could properly be submitted to the appellate court except that raised by the plaintiff's appeal. But by § 755 of the Kentucky Civil Code "The appellee may obtain a cross-appeal, at any time before trial, by an entry on the records of the Court of Appeals." And under this section it is held that "When either party appeals from a final judgment, his adversary may have a cross-appeal from that judgment, for the purpose of correcting any errors in the judgment to his prejudice or any interlocutory judgment or order which has influenced or controlled the final judgment to his prejudice." *Brown* v. *Vancleave*, 86 Kentucky, 381, 386.

The provisions of the Code and the course of previous decisions fairly sustain the decision of the Court of Appeals in the present case to the effect that the now plaintiff in error, by permitting the first judgment to be reviewed at the instance of the plaintiff in the action without interposing a cross-appeal to call into question the decision of the trial court upon the motion to quash the return upon the process, waived its objection to the jurisdiction of the court over it, and could not have any benefit of that objection upon the second appeal.

That a State, without violence to the "due process" clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its courts to contest any

question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in *York* v. *Texas*, 137 U. S. 15; followed in *Kauffman* v. *Wootters*, 138 U. S. 285.

It is true that in *Harkness* v. *Hyde*, 98 U. S. 476, on review of the judgment of a territorial court, it was held that the right of the defendant to insist upon an objection to the illegality of the service of process was not waived by the special appearance of his counsel to move the dismissal of the action or the setting aside of the service upon that ground, nor when that motion was overruled by his answering to the merits; and that the objection was available here as a ground for reversal. To the same effect are the decisions on review of judgments and decrees of the Federal courts. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 206; *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 209; *Goldey* v. *Morning News*, 156 U. S. 518; *Davis* v. *C., C., C. & St. Louis Ry.*, 217 U. S. 157, 174. And a standing rule of a Federal court, requiring a party appearing specially for any purpose to declare at the same time that if the purpose for which the special appearance was made should not be sanctioned or sustained by the court he would appear generally, was held inconsistent with the laws of the United States and therefore invalid. *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, 18. But the recognition and enforcement of this right on the part of defendants in the Federal courts is a matter quite apart from the authority of the States to establish a different rule of practice within their jurisdictions, as was expressly recognized in *York* v. *Texas*, 137 U. S. 15, 17, 20; *Southern Pacific Co.* v. *Denton*, 146 U. S.

202, 208; *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 207; *McLaughlin* v. *Hallowell*, 228 U. S. 278, 289.

The Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714, 732, 733; *York* v. *Texas*, 137 U. S. 15, 21. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case, that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it. As appears from *Southern Pacific Co.* v. *Denton*, and other cases of the same class above cited, the distribution of original and appellate jurisdiction in the Federal courts is such as to sometimes give an advantage of this kind to defendants; but it is not indispensable to "due process of law."

The second Federal question is raised by the insistence of plaintiff in error that the Kentucky Court of Appeals

failed to give such credit to the Illinois statute as it was required to give under Art. IV, § 1, of the Constitution of the United States, and the Act of Congress passed to carry it into effect (§ 905, Rev. Stat.).

Upon an examination of the record, we are unable to perceive that the Kentucky court failed to accord to the Illinois statute the credit to which it was entitled under the Federal system. The court recognized the existence of the statute and its validity, as pleaded by defendant and as admitted by plaintiff's demurrer. It also recognized the relevancy of the statute to the question in controversy, and either admitted or assumed that it had the effect of limiting the powers of defendant with respect to issuing policies of insurance, so far as the terms of the statute extended. Thereupon it became necessary for the court in the due performance of its judicial function to interpret the meaning of the enactment, in order to determine whether it evidenced the purpose of the law-making body to limit the powers of the corporations with respect to business conducted beyond the confines of the State of its origin. So doing, the court held as follows (147 Kentucky, 490, 491):

"Upon an inspection of the whole act we are satisfied that the section above quoted was not intended by the Legislature of Illinois to have an extra territorial effect. It was only intended to regulate the business done in Illinois. The act is a general one governing this character of business and evidently refers to business done in Illinois. . . . When in a charter of an incorporated company restrictions are imposed as to the kind of business it may do, such limitations upon the power of the company ordinarily follow it wherever it goes, that is, when such a company comes into another State, it has only the powers which its charter confers. But that is not this case. The act in question is a general law regulating insurance companies and was evidently designed as a

regulation of the business in the State of Illinois. It has no application to the business done in Kentucky."

It does not appear that the court's attention was called to any decision by the courts of Illinois placing a different construction, or indeed any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it as matter of fact. We are referred to no authoritative judicial construction of the statute in the State of its origin, nor have we searched for any, for what is matter of fact in the state court is matter of fact in this court upon review; and this applies where foreign law is in question in the state court as well as to any other issue of fact. *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Chicago & Alton R. R.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 622.

It is earnestly argued that the court erred in its construction of the Illinois statute. We do not pass upon this question, deeming it to be outside of the limits of our jurisdiction; for it is settled that where in a state court the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the "full faith and credit" clause of the Federal Constitution. *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 222, 227; *Banholzer* v. *New York Life Insurance Co.*, 178 U. S. 402, 406; *Allen* v. *Alleghany Co.*, 196 U. S. 458, 464; *Louisville & Nashville R. R.* v. *Melton*, 218 U. S. 36, 51; *Texas & N. O. R. R. Co.* v. *Miller*, 221 U. S. 408, 416.

Judgment affirmed.

MR. CHIEF JUSTICE WHITE concurs in the result.